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## Chronological List of Relevant Docket Entries

71 Civ. 992    Patrick Mc L. Dougall, et al. v. Jule M. Sugarman, et al.

DATE	PROCEEDINGS
1971	
Mar. 5	Filed Complaint. Issued Summons.
Mar. 5	Filed plttfs Order to Show Cause. Re: Class Action. Ret. 3-9-71.
Mar. 8	Filed summons and copy of complaint with acknowledgment of receipt by Personnel Director, N.Y. City Dept. of Personnel on 3/8/71.
Mar. 9	Filed (in court) Supplemental Affidavits.
Apr. 23	Filed defts Notice of Motion. Re: Dismiss Complaint. Ret. 5-4-71.
May 24	Filed OPINION #37677. Tenney, J. It seems clear that a 3-judge court should be convened to consider the substantial constitutional questions presented herein. Accordingly, I will notify the Chief Judge of this Circuit that a 3-Judge court ought to be convened pur. to Sec. 2284 of Title 28 USC. So ordered. (mailed notice).
May 27	Filed Designation of Judges in addition to the Hon. Charles H. Tenney, to hear and determine this cause as provided by law: Hon. J. Edward Lumbard, U.S.C.J., and Hon. Edward C. McLean, U.S.D.J. for SDNY. (mailed notice).
June 4	Filed order that plttfs' motion for declaratory judgment, etc. will be heard before the court of three judges duly designated on 7-13-71, in courtroom 129. All briefs in support of and in opposition to the motion shall be served and filed not later than 6-28-71, etc. So ordered. Tenney, J.
June 9	Filed Statutory Notice of Hearing by a 3-judge court for 7-13-71 before Lumbard, C.J., McLean, D.J. and Tenny, D.J. in courtroom 129 U.S. Court House, Foley Square, N.Y.

*Chronological List of Relevant Docket Entries*

DATE	PROCEEDINGS
July 1	Filed Memorandum of Law of Municipal Defendants.
July 1	Filed Notice of Motion re: Summary Judgment dismissing action. Ret. 7/13/71 in Room 129 at 4 o'clock.
July 1	Filed plttfs' Memorandum of Law.
July 2	Filed Memorandum of Law on behalf of N.Y. State Atty. General in support of constitutionality of N.Y. Civil Service Law.
July 13	Before three judge court, Lumbard, Ch. J., McLean, J., Tenney, J. Hearing held and concluded. Decision Reserved.
Nov. 9	Filed OPINION #38011. 3-judge court—Lumbard, Cir. J., McLean, D.J., Tenney, D.J. Plaintiffs' motion for class action, preliminary and permanent injunctive relief is hereby granted. SETTLE ORDER ON NOTICE. (mailed notice).
Dec. 23	Filed Order that defts, their successors, etc. are permanently enjoined; Ordered that the three judge court is hereby dissolved and all claims for relief are remanded to the single district judge to whom the motion for the convening of a three judge court was originally presented, the Honorable Charles H. Tenney; and Ordered that execution of this order is STAYED pending a timely appeal by the defendant to the U.S. Supreme Court. So Ordered Lumbard, C.J., McLean, D.J., Tenney, D.J.
1972	
Jan. 19	Filed Notice of Appeal to the Supreme Court of the U. S. by defts. Jule M. Sugarman, Admr. of N. Y. C. Human Resources Administration, and Harry I. Bronstein, City Director of Personnel and Chairman of the New York City Civil Commission.
Jan. 21	Filed Defts Notice of Appeal. (mailed notices)

*Amended Complaint*

## DATE

## PROCEEDINGS

- Feb. 18 Certified record on appeal to Supreme Court of the U. S.
- Feb. 20 Filed true copy of order of Supreme Court of the United States. The appeal from the U.S.D.C. S.D.N.Y. The statement of jurisdiction in this case having been submitted and considered, probable jurisdiction is noted.

**Amended Complaint**

THE UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

PATRICK MC L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA COSTRO, individually and on behalf of all  
other persons similarly situated,

Plaintiffs,

*against*

JULE M. SUGARMAN, Administrator of New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

Defendants.

## I

**PRELIMINARY STATEMENT**

Plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this court declare invalid and enjoin the enforcement of New York State Civil Service Law § 53 which denies appointment for any position in the competitive class of Civil service jobs to any non-citizen. The statute is challenged on the grounds that it is in conflict with provisions contained in the First and Fourteenth

## *Amended Complaint*

Amendment of the Constitution of the United States, and the Immigration and Nationality Act of 1952, as amended 8 U.S.C. § 1101, et seq.

### II

#### JURISDICTION

Jurisdiction is conferred upon the Court as follows;

(a) 28 U.S.C. § 1331 in that the damages to each plaintiff exceeds \$10,000 and the matter arises under the United States Constitution, laws and treaties.

(b) 28 U.S.C. § 1343(3)(4) in that plaintiffs seek relief under 42 U.S.C. § 1981 and § 1983 in that plaintiffs allege deprivations under color of state laws, of rights, privileges or immunities secured by the Constitution of the United States or by Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

(c) Plaintiffs' action for declaratory and injunctive relief, and for damages, is authorized by:

(a) 28 U.S.C. §§ 2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments;

(b) 42 U.S.C. § 1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

### III

#### CLASS ACTION

Plaintiffs bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of themselves and other similarly situated who include all

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lawful resident aliens who are or were employed by State and the City of New York and also includes all lawful United States resident aliens who seek employment with the State of New York and its various local governments. The persons in the class are so numerous as to make joinder impractical and there are common questions of law and fact and plaintiffs' claims are typical of the claims of the class. The plaintiffs will fairly and adequately protect the interests of the class. The parties opposing the class have refused to act, or threaten to refuse to act on grounds generally applicable to the class.

## IV

## THREE JUDGE COURT

This is a proper case for determination by a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 since plaintiffs seek an injunction to restrain defendants, who are, for the purpose of this action state officers from the enforcement, operation and execution of a state statute (New York State Civil Service Law § 53) of state-wide applicability on the ground that said statute is contrary to the Constitution of the United States.

## V

## PLAINTIFFS

The named plaintiff, Patrick Mc L. Dougall, is a resident non-alien properly registered with the United States Immigration Authorities. He was born in Georgetown, Guyana, and is 43 years of age. He has resided in New York City since 1964. He was employed by the Manpower Career and Development Agency of the New York City Human Resources Administration as an Administrative Assistant in the Staff Development Unit and earned an annual salary in excess of \$5,000 per annum.

*Amended Complaint*

The named plaintiff, Esperanza Jorge, is a resident alien of the United States and properly registered with the United States Immigration Authorities. She is 22 years of age and was born in Las Matas de Farfan, Dominican Republic. She has resided in New York City since March 24, 1967. She was employed as a Human Resources Technician in the Manpower and Career Development Agency of the New York City Human Resources Administration, and earned an annual salary in excess of \$5,000.

The named plaintiff, Teresa Vargas, is a resident alien of the United States and properly registered with the United States Immigration Authorities. She is 24 years of age and was born in Santo Domingo, Dominican Republic. She has resided in New York City since December 8, 1963. She was employed as a Clerk Typist in the Manpower and Career Development Agency of the New York City Human Resources Administration, and earned an annual salary in excess of \$5,000.

The named plaintiff, Sylvia Castro, is a non-resident alien properly registered with the Immigration Authorities of the United States. She is 26 years of age and was born in San Salvador, El Salvador. She has resided in New York City since March, 1967. She was employed as a Senior Human Resources Technician in the Manpower and Career Development Agency of the New York City Human Resources Administration, and earned an annual salary in excess of \$5,000.

## VI

## DEFENDANTS

1. The defendant Jule M. Sugarman is the Administrator of the New York City Human Resources Administration.

### *Amended Complaint*

2. Defendant Harry L. Bronstein is the City Director of Personnel and Chairman of the New York City Civil Service Commission.

3. Defendant Sugarman, is charged with enforcement of Civil Service Law § 53 in his department in which all of the named plaintiffs are employed.

4. Defendant Bronstein is charged with enforcement of Civil Service Law § 53 in all agencies and departments of New York City.

## VII

### FACTUAL ALLEGATIONS

1. Civil Service Law § 53 makes United States Citizenship a requirement for appointments to any Civil Service position in the competitive class in New York State.

2. Plaintiffs Patrick Mc L. Dougall, Esperanza Jorge, Teresa Vargas, Sylvia Castro and all other persons similarly situated are resident aliens of the United States.

3. Prior to December 20, 1970 the named plaintiffs had positions in various non-profit organizations which received funds through New York City Human Resources Administration from the United States Office of Economic Opportunity.

4. On or about December 28, 1970 the Office of Economic Opportunity funds ceased.

5. Sometime in November the defendant Sugarman and his agents informed all employees of said non-profit organizations that they would be employed by the City.



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6. All of said employees including the named plaintiffs were informed that they would be insured of employment and of similar salaries.

7. On or about February 11, 1971, the director of personnel of the New York City Human Resources Administration Harold O. Basden called the plaintiffs and others together and informed them that they would be dismissed in compliance with New York State Civil Service Law § 53 (1).

8. All of the named plaintiffs were employees of the Manpower and Career Development Agency of the New York City Human Resources Administration up to and including March 5, 1971.

9. All the named plaintiffs are fully qualified for the jobs they held with the City of New York and were discharged solely because they are not United States citizens.

10. Discharge of the plaintiffs has resulted in irreparable harm to them in that they will be unable to work at the jobs which they have held for several years and for which they are qualified. Moreover, the plaintiffs as aliens will have great difficulty in finding similar or other employment.

11. Plaintiffs and all other resident aliens, who would otherwise be qualified cannot obtain employment from the City of New York merely because they are not citizens of the United States.

## VIII

## FIRST CAUSE OF ACTION

For a first cause of action plaintiffs allege:

1. The New York Civil Service Law § 53 provides that in order to be eligible for appointment and employment in



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a Civil Service position in a competitive class persons must be citizens of the United States.

2. This provision creates two classes of persons for purposes of such appointment and employment: one class composed of qualified United States citizens and another class composed of qualified non-citizens.

3. Qualified persons who in all other ways qualify for appointment are denied appointment in New York solely because they are not citizens.

4. These qualified persons who are denied appointment are indistinguishable from those who are appointed except for their lack of citizenship.

5. No adequate state justification exists for this arbitrary classification scheme embodied in Civil Service Law, § 53 and hence it is invalid under the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

6. By impermissibly denying individuals their right to such appointment § 53 works a denial of due process guaranteed by the Fourteenth Amendment to the Constitution of the United States.

**IX****SECOND CAUSE OF ACTION**

For a second cause of action plaintiffs allege:

1. The New York Civil Service Law § 53 denies aliens their right to travel within the geographic boundaries of the United States.

*Amended Complaint*

2. In denying employment to aliens in a substantial area of the employment market, to wit, civil service employment, the defendants and the state inhibit the rights of aliens to enter and settle within the boundaries of New York State.

3. This exercise of control of aliens right to travel denies aliens rights, privileges and immunities guaranteed by the United States Constitution and laws.

## X

## THIRD CAUSE OF ACTION

For a third cause of action plaintiffs allege:

1. In denying employment to aliens, the state law is regulating the actions and activities of aliens.

2. The power to regulate the actions and activities of aliens lies solely with the United States Congress and the federal government.

3. § 53 of the New York Civil Service Law is in violation of the United States Immigration and Naturalization Act.

## XI

## PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray, on behalf of themselves and all others similarly situated, that this Honorable Court:

1. Assume jurisdiction of this cause, convene a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284

*Amended Complaint*

to determine this controversy, and set this case down promptly for a hearing.

2. Determine by order, pursuant to Rule 23 (c) (1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.

3. Pending a hearing and determination by the three-judge court, grant a temporary restraining order pursuant to 28 U.S.C. § 2284 (3) restraining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from continuing to cause irreparable harm to plaintiff and other persons similarly situated by refusing to employ them in civil service positions in the competitive class to which they are entitled and that would otherwise be available except for the fact that they are not citizens of the United States.

4. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2204 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that Civil Service § 53 is invalid on the grounds that it is violative of provisions contained in the First and Fourteenth Amendment to the United States Constitution and the laws of the United States.

5. Enter preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, enjoining defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from refusing to appoint and employ plaintiffs and all persons similarly situated in civil service positions in the competitive classification on the grounds that they are not citizens of the United States.

6. Grant each plaintiff damages of \$10,000 as represented by lost earnings resulting from their discharge from employment.

*Order to Show Cause*

7. Grant plaintiffs and all persons similarly situated such additional alternative relief, as may seem to this court to be just, proper and equitable.

Respectfully submitted,

LESTER EVENS  
MFY Legal Services, Inc.  
Lester Evens, Esq.  
Jeffrey G. Stark, Esq.

(Verified by Esperanza Jorge on March 15, 1971.)

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**Order to Show Cause for Class Action Order, to Convene Three-Judge Court and for Temporary Restraining Order**

CIVIL ACTION No. 71 Civ. 992

THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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Upon the verified complaint and affidavits of Patrick Mc L. Dougall, Esperanza Jorge, Teresa Vargas and Sylvia Castro it is

ORDERED, that the defendants Jule M. Sugarman and Harry I. Bronstein show cause in Room 506 of the United

*Order to Show Cause*

States Courthouse at Foley Square on the 9th day of March, 1971 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not issue or the court take such other action as shall grant the Plaintiffs herein the following relief:

1. An order pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure determining that this action may properly proceed as a class action pursuant to Rule 23(a), (b) (2) because: the class, consisting of all alien residents residing in the State of New York who are employed by the City of New York or who would be employed but for New York State Civil Service Law § 53 that requires them to be citizens of the United States, is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the representative party are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class has acted on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief with respect to the class as a whole.

2. The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction and this cause, in accordance with the provisions of Title 28, United States Code, Sections 2281 and 2284 which require the convening of such a court when an interlocutory and permanent injunction are sought to restrain a state officer from the enforcement of a statewide statute that is alleged to conflict with the Constitution of the United States. The preliminary and permanent injunction are sought to restrain the Defendants, who are state officers, their suc-

*Order to Show Cause*

cessors in office, agents and employees, and all other persons in active concert and participation with them, from terminating employment or refusing to grant employment to the Plaintiffs and all persons similarly situated solely on the ground that they are not citizens of the United States as required by New York State Civil Service Law § 53.

3. A temporary restraining order pursuant to Title 28, United States Code, Section 2284(3) restraining the Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them from terminating employment, pending the hearing and determination by a three-judge court convened pursuant to Title 28, United States Code, Sections 2281 and 2284, to give the Plaintiffs and all persons similarly situated on the grounds that they are not citizens of the United States as required by New York State Civil Service Law § 53.

Plaintiffs seek this relief for themselves and all others similarly situated on the grounds that:

(a) they and all others similarly situated are each suffering, or are threatened with imminent suffering, of irreparable damage in that they are without employment with which to provide themselves and their families and will continue to suffer even greater deprivation unless they can maintain their present positions or obtain employment from the City of New York for which would otherwise qualify.

(b) the issuance of a temporary restraining order will not cause undue inconvenience or loss to the Defendants but will prevent irreparable damage to the Plaintiffs and others similarly situated;

*Order to Show Cause*

(c) the statute (N.Y.S. Civil Service Law § 53) that deprives Plaintiffs and all others similarly situated of employment by the City of New York violates the Fourteenth Amendment of the Constitution of the United States.

(d) Plaintiff has no adequate remedy at law, as set forth more fully in the verified complaint and the affidavits of Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas and Sylvia Castro, attached hereto.

ORDERED, ADJUDGED AND DECREED THAT, pending hearing and determination of Plaintiffs' motion for an order determining this matter to be a proper class action, an order convening a three-judge court and for an order restraining Defendants from terminating employment of Plaintiffs and all others similarly situated,

ORDERED, that service of this Order on Defendants on or before the 5th day of March, 1971, be deemed sufficient.

Dated: New York, N. Y.

March 5, 1971

MARVIN E. FRANKEL  
United States District Judge

**Affidavit of Patrick Mc L. Dougall in Support of  
Order to Show Cause**

**THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

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**[S A M E T I T L E]**

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**STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:**

**PATRICK MC L. DOUGALL**, being duly sworn, deposes and says:

1. He is one of the plaintiffs in the above-entitled action.
2. He is a resident alien of the United States and is properly registered with the United States Immigration authorities.
3. He is 43 years of age, having been born in Georgetown, Guyana on September 27, 1927.
4. He has been a resident of the City of New York since 1964, presently residing at 340 Hudson Walk, Brooklyn, New York.
5. At the time of his entry into the United States and thereafter he was self-supporting.
6. From April, 1968, until the present, deponent has been employed by the Manpower and Career Development Agency of the New York City Human Resources Administration as an administrative assistant in the staff Development Unit.



*Affidavit of Patrick Mc L. Dougall*

7. On or about February 11, 1971, deponent was informed by Harold O. Basden, the Personnel Director of the New York City Human Resources Administration, that his employment was terminated because he was not a citizen of the United States, as required by New York State law.

8. At the meeting with Mr. Basden, aforesaid, Mr. Basden stated that deponent's employment would be terminated on March 5, 1971.

9. Deponent, as required by his employer, did take a Civil Service Examination for the position of Senior Human Resources Specialist. Deponent's employer, Manpower and Career Development Agency, informed deponent by publication of a list in November, 1970, that deponent had passed the examination.

10. That deponent is trained and experienced in the career development of underprivileged persons and has no other skill or qualifications that would enable him to obtain employment at a comparable level of responsibility and salary with his present position.

11. That deponent is being discharged solely because he is not a citizen of the United States.

12. That deponent will be irreparably harmed as he has no opportunity to find other similar employment and he as well as his wife and five children will be without any means of support.

13. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from discharging deponent and all

*Affidavit of Sylvia Castro*

other persons similarly situated because of non-citizenship in the United States, to confer a three-judge court and to treat this proceeding as a class action and for such other and further relief as the court may deem just and proper.

(Sworn to by Patrick Mc L. Dougall on March 4, 1971.)

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**Affidavit of Sylvia Castro in Support of Order  
to Show Cause**

THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

SYLVIA CASTRO, being duly sworn, deposes and says:

1. She is one of the plaintiffs in the above entitled action.
2. She is a resident alien of the United States and is properly registered with the United States Immigration authorities.
3. She is 26 years of age, having been born in San Salvador, El Salvador on June 3, 1944.
4. She has been a resident of New York City, since March, 1967, presently residing at 1380 Merriam Avenue, Bronx, New York.

*Affidavit of Sylvia Castro*

5. At the time of her entry into the United States and thereafter, she was self-supporting.

6. That deponent was originally employed on June 16, 1969, by the Puerto Rican Forum in the Manpower program. Said employer is, upon information and belief, a non-profit membership corporation and was funded through the City of New York with federal funds from the Office of Economic Opportunity.

7. That on or about the 28th day of December, 1970, deponent's employment was transferred to the New York City Human Resources Administration.

8. Subsequently, on or about February 11, 1971, deponent, together with about twenty-five (25) others, was informed by the Director of Personnel of the Human Resources Administration that deponent's employment was being terminated on March 5, 1971. The reason given was that deponent is a non-citizen of the United States and as an employee of the City of New York since December 28, 1970, deponent's position was now under Civil Service. That the laws of the State of New York prohibited employment of non-citizens in Civil Service jobs.

9. That deponent is presently employed as a Senior Human Resources Technician and was also employed prior to December 28, 1970 by her former employer in the same position.

10. That deponent was originally employed by her former employer, Puerto Rican Forum, as an assistant counselor. Said employer then trained deponent, on the job, for her present employment.

11. That deponent is irreparably harmed because she cannot obtain a position of similar skill, responsibility and

*Affidavit of Teresa Vargas*

salary other than in a Civil Service position and that her status as a resident alien results in discrimination in employment against her.

12. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from terminating her employment and the employment of all others similarly situated, to convene a three-judge court and to treat this matter as a class action and for such other and further relief as this court may deem just and proper.

(Sworn to by Sylvia Castro on March 4, 1971.)

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**Affidavit of Teresa Vargas in Support of Order  
to Show Cause**

THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

TERESA VARGAS, being duly sworn, deposes and says:

1. She is one of the plaintiffs in the above titled action.

*Affidavit of Teresa Vargas*

2. She is a resident alien of the United States and is properly registered with the United States Immigration authorities.
3. She is twenty-four (24) years of age, having been born in Santo Domingo, Dominican Republic on June 23, 1946.
4. She has been a resident of the City of New York since December 8, 1963 residing at 203 West 109th Street, New York, New York.
5. At the time of her entry into the United States and thereafter she was self-supporting except during the period approximately from June, 1968 until June, 1969 when deponent was stricken by rheumatic fever and given financial assistance by the Department of Social Services.
6. That deponent was originally employed on November 16, 1970 by the Puerto Rican Forum in the Manpower program. Said employer is, upon information and belief, a non-profit membership corporation and was funded through the City of New York with federal funds from the Office of Economic Opportunity.
7. That on or about the 28th day of December, 1970, deponent's employment was transferred to the New York City Human Resources Administration.
8. Subsequently, on or about February 11, 1971 deponent, together with about twenty-five (25) others, was informed by the Director of Personnel of the Human Resources Administration that deponent's employment was being terminated on March 5, 1971. The reason given was that deponent is a non-citizen of the United States and as

*Affidavit of Teresa Vargas*

an employee of the City of New York since December 28, 1970, deponent's position was now under Civil Service. That the laws of the State of New York prohibited employment of non-citizens in Civil Service jobs.

9. That deponent is presently employed as a Clerk-Typist and was also employed prior to December 28, 1970 by her former employer in the same position.

10. That when deponent was originally employed by her former employer, Puerto Rican Forum, she was trained, on the job, for her present position.

11. That deponent shall suffer irreparable harm as a result of her termination of employment. That she will be unable to obtain similar employment from other New York City or New York State agencies because of the discriminatory nature of the existing Civil Service laws.

12. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from terminating her employment and the employment of all others similarly situated, to convene a three-judge court and to treat this matter as a class action and for such other and further relief as this court may deem just and proper.

(Sworn to by Teresa Vargas on March 4, 1971.)

**Affidavit of Esperanza Jorge in Support of Order  
to Show Cause**

THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

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[SAME TITLE]

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STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

ESPERANZA JORGE, being duly sworn, deposes and says:

1. She is one of the plaintiffs in the above-titled action.
2. She is a resident alien of the United States and is properly registered with the United States Immigration authorities.
3. She is 22 years of age, having been born in Las Matas de Farfan, Dominican Republic on November 15, 1948.
4. She has been a resident of the City of New York since March 24, 1967, presently residing at 106-02-37th Avenue, Corona, New York.
5. At the time of her entry into the United States and thereafter she was self-supporting.
6. That deponent was originally employed on May 19, 1969 by the Puerto Rican Forum in the Manpower program. Said employer is, upon information and belief, a non-profit membership corporation and was funded through the City of New York with federal funds from the Office of Economic Opportunity.
7. That on or about the 28th day of December, 1970, deponent's employment was transeferred to the New York City Human Resources Administration.



*Affidavit of Esperanza Jorge*

8. Subsequently, on or about February 11, 1971 deponent, together with about twenty-five (25) others, was informed by the Director of Personnel of the Human Resources Administration that deponent's employment was being terminated on March 5, 1971. The reason given was that deponent is a non-citizen of the United States and as an employee of the City of New York since December 28, 1970, deponent's position was now under Civil Service. That the laws of the State of New York prohibited employment of non-citizens in Civil Service jobs.

9. That deponent is presently employed as a Human Resources Technician and was also employed prior to December 28, 1970 by her former employer in the same position.

10. That when deponent was originally employed by her former employer, Puerto Rican Forum, as a clerk-typist. Said employer then trained deponent, on the job, for her present employment.

11. That deponent is irreparably harmed because she cannot obtain a position of similar skill, responsibility and salary other than in a Civil Service position and that her status as a resident alien results in discrimination in employment against her.

12. No prior application has been made for the relief sought herein.

WHEREFORE, deponent respectfully prays this court to restrain defendants from terminating her employment and the employment of all others similarly situated, to convene a three-judge court and to treat this matter as a class action and for such other and further relief as this court may deem just and proper.

(Sworn to by Esperanza Jorge on March 4, 1971.)



## **Affirmation of Lester Evens, Esq. in Support of Order to Show Cause**

Lester Evens, duly licensed to practice law in the State of New York and an attorney in good standing admitted to practice before the United States District Court for the Southern District of New York, affirms and says as follows:

That he one of the attorneys for the Plaintiffs herein.

That he familiar with facts in this case bases upon conversations with the plaintiffs and with certain of their immediate superiors.

That some of the plaintiffs have shown the affirmant letters they have received from their employer, the Human Resources Administration, notified them that there employment had been terminated on various days in February, 1971. That said plaintiffs have been told orally by their supervisors that the dates in the letters were wrong and that their employment would actually be terminated on March 5, 1971. Other plaintiffs received no letters but were informed informally that their employment would end on March 5, 1971.

That he has contacted a supervisor of some of the plaintiffs, by telephone, who informed him that the City of New York does not give formal notices of Termination of employment and that in fact the plaintiffs and all others in similar circumstances will be terminated on March 5, 1971.

That he believes that unless the Defendants are restrained from firing plaintiffs and all others similarly situated they shall suffer irreparable harm.

That the reason Plaintiffs make this application for a temporary restraining order is that irreparable harm will be done to them by the threatened termination in that they will be without employment and that they have no opportunity for new employment with the City of New York and will not be able to support themselves or their families.

*Supplemental Affidavit of Achamma Chandерsekarar*

That upon information and belief affirmant's associate Eugene Murphy did contact the Corporation Counsel of the City of New York and was informed by an assistant corporation counsel Mr. Nespole, that he would appear at 2:30 P.M. in the Judge's chambers and that he would inform all the necessary parties of this application.

Affirmed under the penalties of perjury this 5th day of March, 1971.

LESTER EVENS

**Supplemental Affidavit of Achamma Chandерsekarar,  
in Support of Order to Show Cause**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

ACHAMMA CHANDERSEKARAN, being duly sworn, deposes and says:

1. That she is a lawfully registered resident alien, residing at D-703 Kings Highway Towers, Maple Shade, New Jersey.

2. That she entered the United States in September of 1962 as a student and had at that time a student visa.

*Supplemental Affidavit of Achamma Chandersekaran*

3. In December of 1969, her status was changed to permanent resident and that is her status as of the date of this affidavit.

4. Deponent married on April 4, 1970 and her maiden name, which she had used prior to April 4, 1970, was Achamma Cochuvava Coilparampil.

5. That her Immigration and Naturalization Registration number is #A-12 948 967.

6. Since November 13, 1968, deponent has been employed by Robert B. Mitchell, a prime contractor with the Department of City Planning of the City of New York. That since November 13, 1968 deponent did actually work at the offices of the Department of City Planning at 2 Lafayette Street, New York, New York.

7. As prime contractor Mr. Robert B. Mitchell, upon information and belief, had approximately eighty (80) employees working for him on projects for the New York City Department of City Planning.

8. Upon information and belief at least ten (10), and perhaps more, persons employed by Mr. Mitchell are resident aliens who like deponent, reside within the United States.

9. Sometime in October, 1970, deponent was informed, together with all other employees of Robert B. Mitchell, that on or about March 31, 1971 all of Mr. Mitchell's employees would become part of the permanent staff of the Department of City Planning and would have Civil Service status.

*Supplemental Affidavit of Achamma Chandersekaran*


10. On or about January 9, 1971 deponent was called to the office of Peter S. Richards, Administrative Director of the Department of City Planning and she was informed by Mr. Richards and the Executive Director, Edward Robin, that because of her status as a non-citizen she could not be employed by the Department of City Planning.
11. Since January 9, 1971 deponent has made strenuous effort to seek employment from other employers. Such other employers included private concerns as well as public agencies and has been unable to obtain employment because of the acute shortage of available positions for her skill and training.
12. Deponent has also written to the Mayor of the City of New York and the Governor of the State of New York and has received replies, see letter of February 10, 1971 and March 8, 1971, attached, stating that because of deponent's alienage and the requirements of the New York State Civil Service Law, nothing could be done to help her. The letters further state that unless there is a waiver because of a shortage of qualified applicants then nothing could be done for deponent.
13. Deponent was originally employed by the contractor Robert B. Mitchell as a research assistant and sometime in June, 1969, deponent was promoted to junior city planner. At the time deponent and the other employees were notified of the transfer of their employment to the City of New York deponent was informed that she would again be promoted to an assistant city planner.
14. Deponent's experience and skills both in research and in city planning uniquely suit her for government employment. Although there may be some private employers

*Supplemental Affidavit of Achamma Chandersekaran*

who use city planners such positions are extremely scarce and upon information and belief, none are presently available. The main source of employment for deponent as a city planner is with the government.

15. Deponent has been irreparably damaged by the requirement of the New York State Civil Service Law which prohibits her, so long as she is not a citizen, from obtaining employment with either the State of New York or any of the local governments within the State.

(Sworn to by Achamma Chandersekaran on March 22, 1971.)



**Notice of Motion to Dismiss Amended Complaint****THE UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

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**[S A M E T I T L E]**

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**SIRS:**

PLEASE TAKE NOTICE that upon the Amended Complaint filed herein, the annexed affidavit of Harold O. Basden, sworn to April 5, 1971, with Schedule, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court, at Room 506, United States Court House, Foley Square, New York, N.Y. on the 4th day of May 1971, at 10 o'clock in the forenoon of that day or as thereafter as counsel can be heard for an order pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure dismissing the action on the ground that the Court lacks jurisdiction over the subject matter and for such other, further and different relief as to the Court may seem just and proper.

Dated: New York, New York, April 5, 1971.

**J. LEE RANKIN**  
Corporation Counsel  
Attorney for Defendants

**To:**

**LESTER EVENS, Esq.**  
**JEFFREY G. STARK, Esq.**

**Affidavit of Harold O. Basden in Opposition to Order  
to Show Cause and in Support of Motion to Dis-  
miss Amended Complaint**

THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

---

[S A M E T I T L E]

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STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

HAROLD O. BASDEN, being duly sworn, deposes and says, that he is the Director of Personnel of the Human Resources Administration of the City of New York, and as such, he is thoroughly familiar with the facts herein.

1. This affidavit is submitted in opposition to plaintiffs' motion for a temporary restraining order under 28 U.S.C. § 2284 (3) enjoining the termination of their employment with the Manpower Career Development Agency (a division of the Human Resources Administration) and for orders convening a three judgment under 28 U.S.C. § 2281 and determining that plaintiffs are a proper class under F.R.C.P. 23(a), (b) (2). It is submitted in support of defendants' motion to dismiss the Amended Complaint under F.R.C.P. 12(b) (1) on the ground that the Court lacks jurisdiction over the subject matter.

2. The named plaintiffs are four of a group of twenty non-citizens who were employed by the Manpower Career Development Agency ("MCDA"). Between February 11, 1971 and March 5, 1971, each of the twenty was advised that his services were terminated subject to continuation on payroll status until accrued annual leave and compen-

*Affidavit of Harold O. Basden*

satory time had been paid. The date on which each of the twenty left, or will leave, payroll status is set forth in the accompanying Schedule. As the Schedule shows, only plaintiffs Dougall and Jorge currently remain on payroll status.

3. The twenty non-citizens came into the City civil service on December 28, 1970 when two programs, previously administered by the Puerto Rican Forum ("PRF") and the Institute for Public Administration ("IPA"), were absorbed by MCDA.

The purpose of the PRF and IPA program was the development of job skills among unemployed and underemployed individuals. The programs provided job training, counseling and placement services. They were administered on a regional, or neighborhood, basis and were assisted with federal funds. The Manpower Career Development Agency administered a similar, more centralized job training program on behalf of the City.

In late 1970, the PRF and IPA programs were jeopardized by the loss of their federal funds, and it was mutually agreed that they should be merged with the parallel City program at MCDA.

As a result of the merger of the programs, 450 employees from PRF and IPA were transferred to the City civil service, among them the twenty non-citizens described above.

4. The transferred employees were appointed to pre-existing titles in professional, technical and clerical categories within MCDA. The titles are classified in the competitive class of the civil service (N. Y. Civil Service Law § 44), and the appointments were made on a provisional basis (N. Y. Civil Service Law § 65). The titles and annual salaries of each of the twenty non-citizens are set forth on the schedule.

5. N. Y. Civil Service Law § 53 provides, *inter alia*, that only United States citizens are eligible for appointment to



*Affidavit of Harold O. Basden*

positions in the competitive class unless the municipal commission determines that there is an acute shortage of qualified personnel available to fill a particular class, or particular classes, of positions. In the event of such a shortage, the commission may waive the citizenship requirement subject to the conditions set forth in subdivision 2 of Section 53. (See also Rule 3.4.4 of the Rules and Regulations of the Department of Personnel and the City Civil Service Commission).

6. Personnel investigation of the 450 employees transferred from PRF to IPA revealed that twenty of the group were not United States citizens as indicated on the Schedule. There was no shortage of qualified personnel for the professional, technical and clerical positions to which the transferred employees had been appointed. Accordingly, the twenty non-citizens were declared ineligible, their appointments revoked and their services terminated as described in paragraph "2" above.

7. There are eligible lists in existence for all the titles to which the transferred employees were appointed except the title of Typist. An eligible list for that title will be established shortly. Upon information and belief the persons whose names appear on the aforesaid eligible lists are citizens of the United States and are otherwise fully qualified for appointment. (See N. Y. Civil Service Law § 61, subd. 1 and Rule 4.6.1 of the Rules and Regulations of the Department of Personnel and City Civil Service Commission.)

8. In the event that plaintiffs ultimately succeed in this action, they will be reinstated to their former positions with an appropriate award for backpay.

(Sworn to by Harold O. Basden on April 5, 1971.)

## Schedule Annexed to Basden Affidavit

## SCHEDULE

<i>Name</i>	<i>Date of Entry</i>	<i>Type of Visa</i>	<i>Position</i>	<i>Annual Salary</i>	<i>Date On Pay</i>
Jose Arias	3/13/65	Immigrant	Sr. HRT	\$ 8,200	2/18/66
Frank Bido	8/ 7/68	Resident	HRT	6,400	3/23/66
Sylvia Castro	9/29/65	Resident	Sr. HRT	8,200	2/19/66
Alberto Charles	7/ 4/57	Immigrant	HRS	8,200	3/17/66
Hazel Collins	8/25/65	Resident	Sr. HRT	8,200	3/ 3/66
Patrick Dougall			Sr. HRS	10,700	4/ 6/66
Melvina Douglas	4/ 4/68	Resident	Typist	5,200	3/11/66
Nightingale Guzman	6/15/63	Resident	Sr. HRS	10,700	3/25/66
Ernesto Hernandez	11/18/52	Resident	HRT	6,400	3/ 3/66
Esperanza Jorge	3/24/67	Resident	Sr. Clerk	6,400	4/15/66
Morikee Karouma	11/ /60	Resident	Supv. HRS	12,100	7/16/66
Ivy Lewis	3/12/66	Resident	Sr. HRS	10,300	3/ 5/66
Veive Mbaera	5/19/63	Vol. Dep. Status	HRS	8,500	2/26/66
Aubrey Mitchell	6/ 8/52	Resident	HRS	8,500	2/16/66
Otwane Omulepu	9/15/60	Immigrant	Supv. HRS	12,100	3/ 5/66
Maria Ongay	8/21/67	Immigrant	HRS	9,350	3/ 1/66
Lilia Sanchez	7/19/68	Resident	HRS	9,000	3/ 5/66
Carmen Termine	11/17/62	Immigrant	Typist	5,240	2/26/66
Hugh Thompson	1/10/61	Resident	HRS	10,300	2/26/66
Theresa Vargas	12/ 8/63	Resident	Typist	5,600	2/26/66

*Explanation:*

"HRT" is Human Resources Technician

"Sr. HRT" is Senior Human Resources Technician

"HRS" is Human Resource Specialist

"Sr. HRS" is Senior Human Resource Specialist

"Supv. HRS" is Supervising Human Resource Specialist

**Affirmation of Jeffrey G. Stark, Esq. in Opposition  
to Motion to Dismiss Amended Complaint**

**UNITED STATES DISTRICT COURT,**

**SOUTHERN DISTRICT OF NEW YORK.**

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**[S A M E T I T L E]**

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JEFFREY G. STARK, an attorney duly admitted to practice law in the Southern District of New York, and the courts of the State of New York, hereby affirms under penalty of perjury:

1. This affirmation is offered in opposition to defendants' motion to dismiss the amended complaint for lack of jurisdiction.

2. The affidavit of Harold Basden, dated March 29, 1971, and annexed to defendants' motion to dismiss, admits the central allegations of plaintiffs' complaint—that plaintiffs were dismissed from employment with the City of New York solely on the ground that they were not United States citizens. Said affidavit further admits, see paragraphs 6 and 7, that the positions plaintiffs formerly occupied, Human Resources Specialist, Senior Human Resource Specialist and Senior Clerk can in the future be filled by citizen applicants. The conclusion is clear that the sole employment for which plaintiffs are qualified and for which they have been trained is no longer available to them. This case thus differs markedly from *Tichon v. Harder*, 308 F. Supp. 839 (D.C. Conn. 1970). In the case at hand, the denial of employment with the City of New York constitutes a denial of the only meaningful opportunity for employment available to plaintiffs.

*Affirmation of Jeffrey G. Stark*

3. The proximate loss of meaningful opportunity for employment, and the direct loss of wages, is sufficient ground to sustain the jurisdiction of this court under 28 U.S.C. § 1331. Defendants do not dispute that the action herein arises under the laws and the Constitution of the United States.

4. Jurisdiction of this Court is equally secured by 42 U.S.C. §§ 1981, 1983, and their jurisdictional counterparts 28 U.S.C. §§ 1343 (3), (4). 42 U.S.C. § 1981, which provides that:

“All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . .”

has repeatedly been held applicable to discrimination in employment, see e.g., *Arrington v. Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass 1969), *Young v. Int'l Tele and Telegraph Co.*, 39 U.S.L.W. 2489 (3rd Cir. 2/11/71), and specifically to discrimination against aliens. *Takahashi v. Fish and Game Commission*, 68 S.Ct. 1138 (1948). 42 U.S.C. § 1983, which clothes the District Courts with jurisdiction of claims alleging “a deprivation of a right guaranteed by the Fourteenth Amendment”, *Monroe v. Pape*, 365 U.S. 167, 171, has been held to sustain federal jurisdiction over a conspiracy to deprive a doctor of his employment, *Kletchka v. Driver*, 411 F.2d 436 (2nd Cir. 1969), a conspiracy to abrogate a teacher's contractual rights, *Cobb v. City of Malden*, 202 F.2d 701 (1st Cir. 1953), and see *Bomar v. Keyes*, 162 F.2d 136 (2nd Cir.) and the unlawful denial or revocation of liquor licenses, *Hornsby v. Allen*, 326 F.2d 695 (5th Cir. 1964), *Glicker*

*Affirmation of Jeffrey G. Stark*

v. *Michigan Liquor Control Comm.*, 160 F.2d 96 (6th Cir. 1947). "[D]eprivation of the personal liberty to pursue a calling" is cognizable under § 1983. *Gold v. Lomenzo*, 425 F.2d 959, 961 (2nd Cir. 1970) (revocation of broker's license).

5. Finally, abstention is clearly inappropriate in the case at hand. The federal courts are the primary forum for the vindication of federal rights, and must give "due respect to a suitor's choice of that forum". *Zwickler v. Koota*, 389 U.S. 241. "As a consequence it is now widely recognized that 'cases involving vital questions of civil rights' are the least likely candidates for abstention." *Holmes v. N.Y.C. Housing Authority*, 398 F.2d 262 (2nd Cir. 1968). The exception is where the state statute on its face is so ambiguous as to require prior interpretation by a state court. See generally Moore's Federal Practice § 57.18(2) and cases collected therein. Where, however, the state statute is unambiguous and where the only issue is whether the statute can "pass muster under the due process clause of the Fourteenth Amendment", the Federal Court is the "primary forum for vindicating federal rights." *Escalera v. N.Y.C. Housing Authority*, 425 F.2d 853 (2nd Cir. 1970). The statute in issue is absolutely unambiguous and could not be construed to avoid constitutional doubts.

WHEREFORE, it is respectfully prayed defendants' motion be denied in all respects.

JEFFREY G. STARK  
Jeffrey G. Stark

Dated: New York, New York, May 12, 1971.

# **Opinion and Order of Single District Judge**

**UNITED STATES DISTRICT COURT,**

**SOUTHERN DISTRICT OF NEW YORK.**

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**[SAME TITLE]**

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## **APPEARANCES**

### **For Plaintiffs:**

**MOBILIZATION FOR YOUTH LEGAL SERVICES, INC.**

**759-10th Avenue**

**New York, N. Y.**

**Lester Evens**

**Jeffrey G. Stark, Esqs.—of Counsel.**

### **For Defendants:**

**J. LEE RANKIN, Esq.**

**Corporation Counsel of The City of New York**

**Municipal Building**

**New York, N. Y. 10007**

**Judith A. Gordon, Esq.—of Counsel.**

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**TENNEY, J.**

Plaintiffs, individually and on behalf of all others similarly situated,<sup>1</sup> move this Court pursuant to 28 U.S.C. §§ 2281 and 2284 for an order convening a district court of three judges for the purpose of hearing and determining their application for a preliminary and permanent injunction to restrain defendants from continued enforcement of Section 53 of the New York Civil Service Law.<sup>2</sup>

Basing jurisdiction upon 28 U.S.C. §§ 1343(3), (4); 42 U.S.C. § 1983, and 28 U.S.C. § 1331, plaintiffs seek to

*Opinion and Order of Single District Judge*

prevent defendants from depriving them of their rights as "person[s] . . . [entitled to] . . . due process of law . . . [and] equal protection of the laws" under the Fourteenth Amendment to the United States Constitution. Furthermore, plaintiffs contend that defendants' enforcement of Section 53 denies aliens the right to travel within the United States and encroaches upon the exclusive right of Congress to regulate immigration and naturalization.

In substance, plaintiffs claim that Section 53, which makes non-citizens ineligible for appointment to any position in the competitive class of civil service in New York City, discriminates against aliens residing in the City. More specifically, plaintiffs urge that their discharge from employment merely because they are not American citizens violated their rights to due process and equal protection under the Fourteenth Amendment since American citizens admittedly would not have been discharged.<sup>4</sup> *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). It is further contended that enforcement of Section 53 infringes upon plaintiffs' right to travel among the states, as that right has been recognized in *United States v. Guest*, 383 U. S. 745 (1965) and *Truax v. Raich*, 239 U. S. 33 (1915). Finally, Section 53 is viewed by plaintiffs as encroaching upon the Congressional scheme for immigration and naturalization and hence must be declared void. *Truax v. Raich*, *supra*; *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P.2d 645, 653 (1969).

Defendants, on the other hand, cross-move for dismissal of the within action on the grounds this Court lacks subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), (4). In addition, defendants contend that no substantial federal question requiring the convening of a three-judge court is presented by the within complaint.

We turn first to the motion to dismiss which, if granted, would dispose of the entire action. It appears unlikely



*Opinion and Order of Single District Judge*

that plaintiffs can meet the \$10,000 jurisdictional requirement of 28 U.S.C. § 1331, since the claims of the class members, being separate and distinct, may not be added together, *Snyder v. Harris*, 394 U. S. 332 (1969); *Catalano v. Dep't of Hospitals*, 299 F. Supp. 116, 169 (S.D.N.Y. 1969). Furthermore, since the salary of the highest paid discharged member of the class is \$12,100 per annum and, as of the filing of the complaint, no member of the class had been off the payroll for more than three weeks, it is clear that no individual class member can presently meet the \$10,000 requirement. Moreover, if any class member is subsequently employed by a private employer he may never reach the requisite amount since his lost wages will never reach \$10,000. Finally, it is doubtful whether the future lost wages of which the individual class members may be deprived could be considered by this Court in computing the amount in controversy. *Cf. Eisen v. Eastman*, 421 F.2d 560, 566 (2d Cir. 1969); *Kochhar v. Auburn Univ.*, 304 F. Supp. 565, 567 (D. C. Ala. 1969).

I find defendants' reliance on *Tichon v. Harder*, Docket No. 35151 (2d Cir. Feb. 18, 1971), for dismissing the within action for lack of jurisdiction under 28 U.S.C. § 1343(3), misplaced. In that case, the plaintiff, a case worker in the Connecticut Department of Welfare, claimed she was denied procedural due process when the State fired her. The Court of Appeals, in affirming the dismissal of that action, held that § 1343(3) did not provide jurisdiction since only rights of personal liberty can be asserted under that section when one claims he has been denied procedural due process. "[T]he claim that appellant was denied procedural due process has no independent jurisdictional significance. . . ." *Tichon v. Harder*, *supra* at 1550. Clearly, the loss of employment is a property right vis-a-vis a right of personal liberty. However, plaintiffs contend not merely that they were denied procedural due process, but that they

*Opinion and Order of Single District Judge*

were also denied equal protection of the laws when the City discriminated against them. This, of course, involves a matter of personal liberty. See *Arrington v. Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass. 1969). To hold otherwise would permit the City to dismiss an employee because of his race and yet offer him no opportunity for redress in the federal courts unless the matter in controversy satisfied the \$10,000 jurisdictional requirement of § 1331. Furthermore, such a holding would fly in the face of the very language of § 1343(3) and that of the Fourteenth Amendment.

I conclude, therefore, that this Court does in fact have jurisdiction, under 28 U.S.C. § 1343(3), of the instant action. *Madison v. Wood*, 410 F.2d 564, 567 (6th Cir. 1969); *Penn. v. Stumpf*, 308 F. Supp. 1238, 1244-46 (N.D. Cal. 1970); cf. *Davenport v. Berman*, 420 F.2d 294, 296 (2d Cir. 1969).

The next issue is whether the plaintiffs' complaint raises a substantial constitutional question necessitating the convening of a three-judge court. In a recent unanimous decision, *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77; 456 P.2d 645 (1969), the California Supreme Court held that a state statute prohibiting the employment of aliens on public works was unconstitutional in that it: (1) offended the equal protection clause of the Fourteenth Amendment of the United States Constitution, and (2) interfered with the congressional scheme for immigration and naturalization. There has also been a recent adoption of stricter standards of judicial review in cases dealing with "suspect classifications" or "fundamental interests". *Keyishian v. Bd. of Regents*, 385 U. S. 589 (1967); *Takahashi v. Fish & Game Comm.*, 334 U. S. 410, 420 (1948); *Hawkins v. Town of Shaw*, 39 U.S.L.W. 2431 (5th Cir. Feb. 9, 1971); See generally, *Developments in the Law—Equal Protection* 82 Harv. L. Rev. 1065 (1969). Under this standard, the state

*Opinion and Order of Single District Judge*

must show the classification is necessary to a compelling state interest, rather than merely demonstrate a reasonable relation between the restriction and any possible valid state interest. Defendants argue, however, that the standard applies only to classifications which penalize the exercise of specific constitutional or fundamental rights and not with respect to public employment. Again, the defendants fail to perceive the gravamen of the instant action—denial of equal protection of the laws. "While there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment." *Whitner v. Davis*, 410 F.2d 24, 30 (9th Cir. 1969).

In light of the recent ruling of the California Supreme Court and the other noted developments in equal protection, it seems clear that a three-judge court should be convened to consider the substantial constitutional questions presented herein.

Accordingly, I will notify the Chief Judge of this Circuit that a three-judge court ought to be convened pursuant to Section 2284 of Title 28 of the United States Code.

So ordered.

Dated: New York, New York  
May 24, 1971.

CHARLES H. TENNEY  
U.S.D.J.

*Opinion and Order of Single District Judge*

FOOTNOTES

<sup>1</sup> Pg. 1. The determination as to whether the case is appropriately brought as a class action and, if so, the propriety of the definition of the class, is deferred for decision by the three-judge court.

<sup>2</sup> Pg. 2. N. Y. CIVIL SERVICE LAW § 53 (McKinney 1970)  
"Citizenship requirements.

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

2. . . ."

<sup>3</sup> Pg. 3. 28 U.S.C. § 1343, in pertinent part, provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) . . .

(2) . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

<sup>4</sup> Pg. 3. The relevant language of the Fourteenth Amendment provides:

"[N]or [shall any State] deny to any *person* within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

**Answer of Municipal Defendants**

**THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

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**[S A M E T I T L E]**

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Defendants, Jule M. Sugarman, Administrator of the New York City Human Resources Administration, and Harry I. Bronstein, New York City Personnel Director and Chairman of the New York City Civil Service Commission, answering the Amended Complaint herein by their attorney, J. Lee Rankin, Corporation Counsel, respectfully allege:

**FIRST:** Deny each and every allegation in paragraph "I" except admit that plaintiffs, individually and on behalf of all other persons similarly situated, seek to have this Court declare invalid and enjoin the enforcement of New York State Civil Service Law § 53 and that said statute is challenged on the grounds that it conflicts with the provisions contained in the First and Fourteenth Amendments of the Constitution of the United States, and the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1101, et seq.

**SECOND:** Deny each and every allegation in paragraph "II(a)" except admit that the matter arises under the United States Constitution.

**THIRD:** Deny each and every allegation in paragraphs "II(b)" and "II(c)", subparagraph "(b)" insofar as said paragraphs allege that 28 U.S.C. § 1343 (3) and (4) and 42 U.S.C. §§ 1981 and 1983 provide a basis for the Court's jurisdiction.

*Answer of Municipal Defendants*

**FOURTH:** Deny each and every allegation in paragraph "III" except admit that plaintiffs purport to bring this action as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and that plaintiffs define said class as themselves and others similarly situated who include all lawful resident aliens who are or were employed by the State and City of New York and also includes all lawful United States resident aliens who seek employment with the State of New York and its various local governments.

**FIFTH:** Upon information and belief, deny each and every allegation in paragraph "V" except admit as follows:

The named plaintiff Patrick McL. Dougall, is a resident alien properly registered with the United States Immigration Authorities, that he was born in Georgetown, Guyana and that he was employed by the Manpower Career Development Agency of the New York City Human Resources Administration at an annual salary in excess of \$5,000 per annum.

The named plaintiff, Esperanza Jorge is a resident alien properly registered with the United States Immigration Authorities, that she was twenty-two years old at the time of the commencement of this action and that she was employed by the Manpower Career Development Agency of the New York City Human Resources Administration at an annual salary in excess of \$5,000. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff was born in Las Matas de Farfan, Dominican Republic, and that she has resided in New York City since March 24, 1967.

The named plaintiff Teresa Vargas is a resident alien properly registered with the United States Immigration Authorities, that she was twenty-four years old at the

*Answer of Municipal Defendants*

time of the commencement of this action and that she was employed by the Manpower Career Development Agency of the New York City Human Resources Administration as a Typist at an annual salary in excess of \$5,000. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff was born in Santo Domingo, Dominican Republic and that she has resided in New York City since December 8, 1963.

The named plaintiff Sylvia Castro is a resident alien properly registered with the United States Immigration Authorities, that she was twenty-six years old at the time of the commencement of this action, that she has resided in New York City at least since March, 1967 and that she was employed by the Manpower Career Development Agency as a Senior Human Resources Technician at an annual salary in excess of \$5,000.

**SIXTH:** Deny each and every allegation in paragraph "VII" subparagraph "1".

**SEVENTH:** Upon information and belief, deny each and every allegation in paragraph "VII" subparagraphs "5" and "6".

**EIGHTH:** Upon information and belief, deny each and every allegation in paragraph "VII" subparagraph "8" except admit that plaintiffs Dougall and Jorge were on City payroll status up to and including March 5, 1971.

**NINTH:** Deny each and every allegation in paragraph "VII", subparagraphs "9", "10" and "11".

**TENTH:** Deny each and every allegation in paragraph "VIII" and all the subparagraphs therein.



*Answer of Municipal Defendants*

**ELEVENTH:** Deny each and every allegation in paragraph "IX" and all subparagraphs therein.

**TWELFTH:** Deny each and every allegation in paragraph "X" and all the subparagraphs therein.

**FACTUAL ALLEGATIONS**

**THIRTEENTH:** The named plaintiffs are resident aliens.

**FOURTEENTH:** Plaintiffs came into the City civil service on or about December 28, 1970 when two privately sponsored job training programs were merged with a similar City sponsored program. (A description of the programs and the reasons for their merger are set forth at paragraph "3" of the affidavit of Harold O. Basden, Director of Personnel of the N.Y.C. Human Resources Administration, sworn to April 5, 1971, hereinafter "Basden affidavit").\*

**FIFTEENTH:** Upon entry into the City civil service, plaintiffs were appointed provisionally to competitive class titles within the Manpower Career Development Agency of the N.Y.C. Human Resources Administration. (See Basden affidavit at paragraph "4" and annexed Schedule, columns "3" and "4".)

**SIXTEENTH:** Each of the plaintiffs completed a form provided by the N.Y.C. Department of Personnel entitled "Request for Approval of Provisional, Exceptional, Seasonal, Temporary or Military Replacement Appointment."

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\* The Basden affidavit was submitted on defendants' earlier motion to dismiss the action for lack of subject matter jurisdiction. It is resubmitted with defendants' Answer for the convenience of the Court and the parties.

*Answer of Municipal Defendants*

Each form requires the applicant to list the previous positions he has held which "tend to qualify [him] for the position sought" and further requires the applicant to attest to the truth of the information provided. (The "Request for Approval of Provisional, Exceptional, Seasonal, Temporary or Military Replacement Appointment", hereinafter "Request for Provisional Appointment", submitted to the Department of Personnel by each of the named plaintiffs is annexed hereto and made a part hereof marked Exhibits "1" (Dougall), "2" (Jorge), "3" (Vargas) and "4" (Castro).)

SEVENTEENTH: None of the plaintiffs was certified pursuant to 8 U.S.C. § 1182(a)(14) or related provisions of the Immigration and Nationality Act of 1952 for the title he held in the City civil service or for any similar position in the private sector.

EIGHTEENTH: Upon review of the Requests for Provisional Appointment, the N.Y.C. Department of Personnel learned that plaintiffs were not citizens of the United States. See Civil Service Law § 53, subd. 1.

NINETEENTH: From the time of plaintiffs' provisional appointments down to date, no waivers of United States Citizenship authorized by N.Y. Civil Service Law § 53, subd. 2, have been in effect with respect to the competitive class titles in which plaintiffs were employed.

TWENTIETH: Between February 11, 1971 and March 5, 1971, plaintiffs were advised that they were dismissed from the N.Y.C. Human Resources Administration subject to continuation on payroll status until accrued leave and compensatory time had been paid. (See Basden affidavit at paragraph "2" and Schedule, column "6".)

*Answer of Municipal Defendants*

**TWENTY-FIRST:** Plaintiffs' dismissals were required by the statutory mandate contained in Civil Service Law § 53.

**TWENTY-SECOND:** Plaintiff Castro was dismissed for the additional reason that she lacked sufficient experience to qualify for the position of Senior Human Resources Technician (Defendants' Exhibit "4", p. 1).

**TWENTY-THIRD:** Upon information and belief, only plaintiff Dougall took and passed a competitive examination for the position he held provisionally with the N.Y.C. Human Resources Administration. However, at the time of his dismissal, plaintiff Dougall retained his provisional status.

**TWENTY-FOURTH:** There are eligible lists in existence for all the titles formerly held by the plaintiffs except the title of Typist. Upon information and belief, an eligible list for that title will be established shortly.

**TWENTY-FIFTH:** Upon information and belief, the persons whose names appear on the aforesaid eligible lists are United States citizens and otherwise fully qualified for appointment.

**FURTHER ANSWERING THE AMENDED COMPLAINT AND AS AND FOR A FIRST DEFENSE, DEFENDANTS RESPECTFULLY ALLEGE:**

**TWENTY-SIXTH:** The Court lacks jurisdiction over the subject matter of this action.\*\*

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\*\* This defense was raised on defendants' earlier motion to dismiss the action. It is repeated here for the convenience of the Court and the parties.

*Answer of Municipal Defendants***SECOND DEFENSE**

**TWENTY-SEVENTH:** N.Y. Civil Service Law § 53 is constitutional and does not contravene the Fourteenth Amendment to the United States Constitution.

**THIRD DEFENSE**

**TWENTY-EIGHTH:** N.Y. Civil Service § 53 is constitutional and does not contravene the First Amendment to the United States Constitution.

**FOURTH DEFENSE**

**TWENTY-NINTH:** N.Y. Civil Service § 53 is constitutional and does not deny plaintiffs the right to enter and reside within New York State and/or any of the political subdivisions thereof.

**FIFTH DEFENSE**

**THIRTIETH:** The power to pass laws affecting resident aliens does not rest solely with the United States Congress.

**THIRTY-FIRST:** The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq., does not pre-empt the field of employment of resident aliens in state and local government.

**THIRTY-SECOND:** N.Y. Civil Service Law § 53 is not inconsistent with any provision of the Immigration and Nationality Act of 1952.

*Answer of Municipal Defendants*

## SIXTH DEFENSE

THIRTY-THIRD: N.Y. Civil Service Law § 53 does not interfere with the power of the federal government to conduct the foreign relations of the United States.

## SEVENTH DEFENSE

THIRTY-FOURTH: Assuming *arguendo* that the court finds that plaintiffs' civil rights have been violated by the operation of N.Y. Civil Service § 53, defendants Sugarman and Bronstein are immune from damages under 42 U.S.C. 1983 and 28 U.S.C. 1343(3) and (4). Said defendants acted in good faith and in accordance with the mandate of Civil Service § 53 at a time when said statute was presumed to be valid.

WHEREFORE, defendants pray for Judgment in their favor dismissing the action and awarding them costs.

Respectfully submitted,

J. LEE RANKIN  
Corporation Counsel  
Attorney for Defendants  
Sugarman and Bronstein

**Exhibit "1" Annexed to Answer\***By E.O.P.  
Date ByDo NOT WRITE HERE  
Appl. No. [Illegible]**THE CITY OF NEW YORK  
DEPARTMENT OF PERSONNEL  
220 Church Street, New York, N. Y. 10013****REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL,  
SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT  
APPOINTMENT****SECTION A—To be Filled in by Appointing Officer (NOTE:  
*Attach F.B.I. Fingerprint Form FD 258*)**Dept. or Agency *Human Resources Administration (MDT)*Effective date of this appointment *12/28/70*Title of position *Sr. Human Resources Specialist*Title code No. *OB168* Eval. title code No.Position No. Salary *10,200* Pay gradeBorough work location *Manhattan*Appointment to be made under commission rule and for  
reason checked below:

- ☒ 5. 5. 1 - Provisional - In a permanent vacancy ☐ 5. 4. 1 -  
Temporary - Not to exceed one month ☐ 5. 6. 1 -  
Seasonal ☐ 5. 4. 2 - Temporary - Leave of absence  
for \_\_\_\_\_ months. Granted to \_\_\_\_\_  
☐ 5. 7. 2 - Exceptional - For service outside N. Y. City

\* The text from which Exhibits "1" through "4" were reproduced was illegible in part. The Court is respectfully referred to the original Exhibits filed with the record on this appeal for the portions marked "illegible" in the Appendix.

*Exhibit "1" Annexed to Answer*

☐ 5. 4. 3 - Temporary - Where position will exist for \_\_\_\_\_ months. ☐ Sec. 243 - Military leave of \_\_\_\_\_

Knowing the provisions of Section 95 of the Civil Service Law, and with full knowledge of the responsibility and liability placed upon me thereby, I certify that this appointment is properly made under the rule checked above; that I am familiar with the qualifications of the proposed appointee; that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer **HAROLD O. BASDEN**

Title

Date 2/5/71

SECTION B (Personal History Section)—To be filled in by Applicant (Print in ink or type)

1. Name (First, Middle Initial, Last) *Patrick McL. Dougall*
2. Address (Include Borough and Zip Code No.) *340 Hudson Walk Brooklyn, N.Y. 11201*
3. Sex\* ☒ Male ☐ Female
4. Date of Birth\* *Sept. 27, 1927*
5. Describe physical defects or ailments, if any *None*

\* The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.



*Exhibit "1" Annexed to Answer*

6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
7. Are you a citizen of the United States? ☐ Yes ☐ No  
[Illegible]
8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If your answer to question 8 or 9 is "yes", give full details below.

10. Are you a permanent City employee? ☐ Yes ☐ No
- 10A. If yes, state: Department Title of Permanent Position

## SECTION C—For Department of Personnel

Payroll Division—Approved under Rule 5. 4. 1 for 30 days from effective date. Initials [Illegible] Date [Illegible]

Bureau of Examinations ☐ Qualified ☒ Not Qualified because lacks U.S. citizenship Initials: LF Date: 2.22.71

## DECLARATION (To be completed by applicant)

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained therein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed PAT DOUGALL

Date 12/3/70

*Exhibit "1" Annexed to Answer***EDUCATION** Name of School

High School or Trade School *Washington High* Day or Night *D* From Mo. Yr. *1/40* To Mo. Yr. *12/44*  
 Were You Graduated? (Yes or No) *Yes* Degree Received

Total Credits Completed      Major Subject  
 No. of Credits in Major

College or Other School *Birmingham Univ* Day or Night *D* From Mo. Yr. *9/50* To Mo. Yr. *12/50*  
 Were You Graduated (Yes or No) *No* Degree Received

Total Credits Completed *10* Major Subject *Accountancy*  
 No. of Credits in Major [illegible]

*Cornell Univ* Day or Night *N* From Mo. Yr. *3/70* To Mo. Yr. *6/70* Were you Graduated (Yes or No)  
*No* Degree Received      Total Credits Completed *3*  
 Major Subject *Sociology & Psychology* No. of Credits in Major *18* [Illegible] No. of Credits in Major *3*

**EXPERIENCE:** List in chronological order, starting with your present or most recent position, those positions which tend to qualify you for the position sought. List as a separate employment every material change of duties with the same employer.

- [1] Dates of Employment (Give Month and Year) From *11/68* to *Present* Exact Title of Your Position *Administrative Assistant* Salary *\$10,700* Number of Hours Work Per Week *35 hrs* Name and Address of Employer *Manpower Career Dev. Agcy. 460 W. 42nd St. N.Y., N.Y.* Nature of Business *Training*. Number and Kind of Employees Supervised by You *25 Supervisors, trainers & clerical staff* If With New York City or State, Was This a Provisional Appointment? ☐ Yes ☐ No. Description of Your Work *Assist and advise team leaders with training preparation, [Illegible] implementation of training and report to*

*Exhibit "1" Annexed to Answer*

*Director, negotiate with Regional Directors, hold supervisory conference with unit personnel, responsible for time, payroll and general administration of unit.*

- [2] Dates of Employment (Give Month and Year) From 11/66 to 11/68 Exact Title of Your Position *Work Preparation Counselor* Salary \$9,500 Number of Hours Work Per Week 35 hrs Name and Address of Employer *Ft. Greene Community Corp 609 Fulton St Brooklyn, N. Y.* Nature of business *Anti-Poverty* Number and Kind of Employees Supervised by You

If with New York City or State, Was This a Provisional Appointment? ☐ Yes ☐ No [Illegible] Description of Your Work *Interviewed clients from disadvantaged areas for vocational training and placement weighed and interpreted information obtained in* [Illegible]

- [3] Dates of Employment (Give Month and Year) From 1/62 to 10/66 Exact Title of Your Position *Accountant* Salary \$120 per wk Number of Hours Work Per Week 35 hrs Name and Address of Employer [Illegible] *Records and Audio Equipment 235 W. 119th St. NYC.* Nature of Business *Records & Audio Equipment* Number and Kind of Employees Supervised by You 2 If with New York City or State, Was This a Provisional Appointment ☐ Yes ☐ No Description of Your Work *Maintain accounts and records in such bookkeeping activities as recording disbursements, expenses, the payment and controls over inventories and purchases, verify orders, audit,* [Illegible] *and vouchers and prepared statements*

**LICENSE:** If a license or professional registration is required for this position, answer the following:

*Exhibit "1" Annexed to Answer*

Title of License you Possess (Valid in N. Y. C.)

License No.

Name of Issuing Agency

Date of Original Issue

Date Last Renewed

Renewal Number (if any)

Date of Expiration

Present any additional information on a separate sheet of this size and attach firmly.

DP-69 Attachment

Name *Patrick Mc[Illegible] Dougall*

Dates of Employment From *1/48* to *12/61*

Name & Address of Employer *Govt of Guyana P.O. Telecommunications Georgetown, Guyana*

Exact Title of Your Position *Asst Engineer & Asst Accountant* Salary *\$415 per week* No. Hrs. Worked Per Week *45 hrs* Nature of Business *Telecommunication* No. & Kind of Employees Supervised By You *45 Jr. Technicians* If N.Y. City of State, Was This a Provisional Appointment?—Yes/ / No/ /

Description of Your Work *Installing & Fitting Switch-Boards & Telephones in Businesses & Residences, Instructing Jr. Technicians on Installation Procedures and Submitting Cost of Installation and Overseas Indents*

**Exhibit "2", Annexed to Answer.**

DO NOT WRITE HERE  
 Appl. No. 26721

PROCESSED BY E.D.P.

Date \_\_\_\_\_ By \_\_\_\_\_

THE CITY OF NEW YORK  
 DEPARTMENT OF PERSONNEL  
 220 Church Street, New York, N.Y. 10013

REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL, SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT APPOINTMENT

SECTION A—To be Filled in by Appointing Officer (NOTE:  
*Attach F.B.I. Fingerprint Form FD-258*)

Dept. or Agency *Hea-MCDA-Rms #5*

Effective Date of this Appointment *12/28/70*

Title of Position *Sr. Clerk*

Title Code No. *10111*

Eval. Title Code No. \_\_\_\_\_

Position No. \_\_\_\_\_

Salary *\$6,400*

Pay Grade \_\_\_\_\_

Borough Work Location *Manhattan*

Appointment to be made under Commission Rule and for reason check below:

- ☒ 5.5.1—Provisional—in a permanent vacancy
- ☐ 5.6.1—Seasonal
- ☐ 5.7.2—Exceptional—for service outside N. Y. City
- ☐ Sec. 243—military leave of \_\_\_\_\_

*Exhibit "2" Annexed to Answer*

- ☐ 5.4.1—Temporary—not to exceed one month
- ☐ 5.4.2—Temporary—leave of absence for \_\_\_\_\_ months,  
granted to \_\_\_\_\_
- ☐ 5.4.3—Temporary—where position will exist for  
months \_\_\_\_\_

Knowing the provisions of Section 95 of the Civil Service Law, and with full knowledge of the responsibility and liability placed upon me thereby, I certify that this appointment is properly made under the rule checked above; that I am familiar with the qualifications of the proposed appointee, that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer *Harold O. Basden (A)*

Title Director of Personnel

Date 12/30/70

SECTION B (Personal History Section)—To be filled in by  
Applicant (PRINT IN INK OR TYPE)

1. Name (First, Middle Initial, Last) *Esperanza I. Jorge*
2. Address (Include Borough and Zip Code No.) *106-03  
37th Avenue, Corona, N.Y.C. 11368*

*Exhibit "2" Annexed to Answer*

3. Sex\* ☐ Male ☒ Female
4. Date of Birth\* 11-15-48
5. Describe physical defects or ailments, if any *None*
6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
7. Are you a citizen of the United States? ☐ Yes ☒ No
8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If your answer to question 8 or 9 is "yes", give full details below.

10. Were you a permanent N. Y. City employee? ☐ Yes ☒ No

10A. If yes, state: Department  
Title of Permanent Position

**DECLARATION (To be completed by applicant)**

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained therein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed *Esperanza I. Jorge*

Date *December 1, 1970*

\* The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.



*Exhibit "2", Annexed to Answer***EDUCATION** Name of School

High School or Trade School [Illegible] Day or Night *D* From Mo. Yr. 9-63 To Mo. Yr. 6-66 Were You Graduated? (Yes or No) *No* Major Subject

College or Other School [Illegible] Day or Night *D* From Mo. Yr. 11-68 To Mo. Yr. 5-69 Were You Graduated? (Yes or No) *Yes* Major Subject

*Spanish High School Inst. 215 W. 43rd St. N.Y.C.* Day or Night *N* From Mo. Yr. 4-68 To Mo. Yr. 11-68 Were You Graduated (Yes or No) *No* Major Subject.

*MCDA Seminar (10 Week)* Day or Night *D* Were You Graduated? (Yes or No) *Certificate*

**EXPERIENCE:** List in chronological order, starting with your present or most recent position, those positions which tend to qualify you for the position sought. List as a separate employment every material change of duties with the same employer.

- 1 Dates of Employment (Give Month and Year) From 5/69 to Present Exact Title of Your Position *Data Collection Clerk* Salary \$6400 Number of Hours Work Per Week 35

Name and Address of Employer *MCDA-RNS #5 601 West 26 St. N.Y.C. 10001* Nature of Business *Anti-Poverty* Number and Kind of Employees Supervised By You If With New York City or State. Was This a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Maintain Client Master File. Receive the Activity Status & Referral Forms. Verify*

**Exhibit "2" Annexed to Answer**

*Any Terminations, Transfers, Graduations, Job Placement and Any Unspecified Items. Confirm Whether or Not the Above Items Are [Illegible]. Keeping a Weekly Activity Report, [Illegible]*

- 2 Dates of Employment (Give Month and Year) From 12/6/8 to 5/69 Exact Title of Your Position *General Clerical* Salary *\$20.10 Wkly* Number of Hours Work Per Week *10 Hrs. (Part Time)*

Name and Address of Employer *American In-Store Serv- ing Corp. 230 Fifth Ave. N.Y.* Nature of Business *Commercial Business* Number and Kind of Employees Supervised By You If With New York City or State. Was This a Provisional Appointment?  
☐ Yes ☒ No

Description of Your Work *Filing Work with the Zerox and Mimeograph Machine Send the Mail, Answer Phone, and a little type.*

**LICENSEE:** If a license or professional registration is required for this position, answer the following:

Title of License You Possess (Valid in N. Y. C.)  
 License No.

Name of Issuing Agency

Date of Original Issue Date Last Renewed  
 Renewal Number (If Any)

Date of Expiration

Present Any Additional Information on a Separate Sheet of This Size and Attach Firmly.

*Exhibit "2" Annexed to Answer*

## SECTION C—For Department of Personnel

Payroll Division—Approved under Rule 5.4.1 for 30 days from effective date.

Initials [Illegible] Date [Illegible]

Bureau of Examinations

☐ Qualified

☒ Not Qualified

because

Does not meet citizenship requirement.

Initials: BG

Date: 12-31-70

**Exhibit "3" Annexed to Answer**

DO NOT WRITE HERE

PROCESSED BY E.D.P.

Appl. No. 26722

Date

By

THE CITY OF NEW YORK  
DEPARTMENT OF PERSONNEL  
220 Church Street, New York, N.Y. 10013

REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL, SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT APPOINTMENT

SECTION A—To be Filled in by Appointing Officer (NOTE:  
*Attach F.B. I Fingerprint Form FD-258*)

Dept. or Agency *HEA-MEDA-RMS #5*Effective Date of this Appointment *12/25/70*Title of Position *Steno*Title Code No. *10205* Eval. Title Code No.Position No. Salary *5600* Pay GradeBorough Work Location *Manhattan*

Appointment to be made under Commission rule and for  
reason checked below:

- ☒ 5.5.1—Provisional—in a permanent vacancy  
☐ 5.4.1—Temporary—Not to exceed one month  
☐ 5.6.1—Seasonal  
☐ 5.4.2—Temporary—leave of absence for \_\_\_\_\_ months,  
 granted to  
☐ 5.7.2—Exceptional—for service outside N. Y. City  
☐ 5.4.3—Temporary—where position will exist for  
 \_\_\_\_\_ months  
☐ Sec. 243—Military leave of

Knowing the provisions of Section 95 of the Civil Service Law, and with full knowledge of the responsibility and liability placed upon me thereby, I certify that this appointment is properly made under the rule checked

*Exhibit "3" Annexed to Answer*

above; that I am familiar with the qualifications of the proposed appointee; that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer *Harold O. Basden (A)*  
Title Director of Personnel

Date 12/30/70

SECTION B (Personal History Section)—To be filled in by Applicant (PRINT IN INK OR TYPE)

1. Name (First, Middle Initial, Last) *Teresa A. Vargas*
  2. Address (Include Borough and Zip Code No.) *203 West 109th Street New York, N. Y. 10025*
  3. Sex\*  
☐ Male ☒ Female
  4. Date of Birth\* *6/23/46*
  5. Describe physical defects or ailments, if any
  6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
  7. Are you a citizen of the United States? ☐ Yes ☒ No
  8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
- \* The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.

*Exhibit "3" Annexed to Answer*

9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If your answer to question 8 or 9 is "yes", give full details below.

10. Were you a permanent City employee? ☐ Yes ☒ No

10A. If yes, state: Department \_\_\_\_\_ Title of  
Permanent Position \_\_\_\_\_

**SECTION C—For Department of Personnel**

**Payroll Division—Approved under Rule 5.4.1 for 30 days from effective date.**

Initials \_\_\_\_\_ Date \_\_\_\_\_

Bureau of Examinations

☐ Qualified

☒ Not Qualified

because \_\_\_\_\_ failed to appear for [Illegible] 1/14/71

Initials: *RW*

Date: *1/18/71*

**DECLARATION (To be completed by applicant)**

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained herein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed *TERESA VARGAS*

Date *12/1/70*

*Exhibit "3" Annexed to Answer***EDUCATION** Name of School

High School or Trade School [Illegible] Day or Night *D*  
 From Mo. Year 11/54 to Mo. Year 1962 (Were You  
 Graduated? (Yes or No) *No* Major Subject

College or Other School *High School* Day or Night *D*  
 From Mo. Year to Mo. Year 1/70 Were You Gradu-  
 ated? (Yes or No) *Yes*. Major Subject

[Illegible] Day or Night *D* From Mo. Yr. 9/69 to Mo.  
 Yr. 7/70 Were You Graduated? (Yes or No) [Il-  
 legible] Major Subject

[Illegible] Day or Night *D* From Mo. Yr. 9/69 to Mo.  
 Yr. 10/70 Were you graduated? (Yes or No)  
 Major Subject

**EXPERIENCE:** List in chronological order, starting with  
 your present or most recent position, those positions  
 which tend to qualify you for the position sought.  
 List as a separate employment every material change  
 of duties with the same employer.

- 1 Dates of Employment (Give Month and Year) From  
 [Illegible] to [Illegible] Exact Title of Your Position  
 [Illegible] Salary \$5,150 Number of Hours Work  
 Per Week 35

Name and Address of Employer *MCDA-RMS #5 601*  
*West 26 Street, New York 10001* Nature of Business  
*Anti-Poverty* Number and Kind of Employees Super-  
 vised by you If With New York City or State. Was  
 This a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Filing, Typing and Answering*  
*Phone*

- 2 Dates of Employment (Give Month and Year) From  
 to 3/70 Exact Title of Your Position *Clerk*  
*typist* Salary \$90.00 Number of Hours Work Per  
 Week 35



*Exhibit "3" Annexed to Answer*

Name and Address of Employer *Bank of New York, 10 Washington Street* Nature of Business [Illegible]  
 Number and Kind of Employees Supervised By You  
 If With New York City or State, Was  
 This a Provisional Appointment? ☐ Yes ☒ No.

Description of Your Work: *Typing, Filing*

3 Dates of Employment (Give Month and Year) From  
*3/68 to 5 or 6/67* Exact Title of Your Position *General Clerk With Diversified Duties* Salary *885.00*  
 Number of Hours Work Per Week *40*

Name and Address of Employer *Feature Rings, 139 West 46th Str., New York* Nature of Business *Factory*  
 Number and Kind of Employees Supervised By You  
 If With New York City or State, Was  
 This a Provisional Appointment? ☐ Yes ☒ No

Description of Your Work *Distribute [Illegible] Classified It, Filing, Up-Date the Files*

LICENSE: If a license or professional registration is required for this position, answer the following:

Title of License You Possess (Valid in N. Y. C.)  
 License No.

Name of Issuing Agency

Date of Original Issue

Date Last Renewed

Renewal Number (If Any)

Date of Expiration

Present Any Additional Information On a Separate Sheet of This Size and Attach Firmly.

**Exhibit "4" Annexed to Answer**

DO NOT WRITE HERE  
 Appl. No. 26618

PROCESSED BY E.D.P.

Date By

THE CITY OF NEW YORK  
 DEPARTMENT OF PERSONNEL  
 220 Church Street, New York, N. Y. 10013

REQUEST FOR APPROVAL OF PROVISIONAL, EXCEPTIONAL,  
 SEASONAL, TEMPORARY, OR MILITARY REPLACEMENT  
 APPOINTMENT

SECTION A—To be Filled in by Appointing Officer (NOTE:  
*Attach F.B.I. Fingerprint Form FP 268*)

Dept. or Agency *HRA MCDD Rms #5* Effective date of  
 this appointment *12/28/70*

Title of position *Sr. HRT (MDT)* Title code No. *03166*  
 Eval. title code No.

Position No. Salary *6,800* Pay grade  
 Borough work location *Manhattan*

Appointment to be made under commission rule and for  
 reason checked below:

- ☒ 5. 5. 1 - Provisional - In a permanent vacancy  
☐ 5. 4. 1 - Temporary - Not to exceed one month  
☐ 5. 6. 1 - Seasonal  
☐ 5. 4. 2 - Temporary - Leave of absence for months.  
 Granted to  
☐ 5. 7. 2 - Exceptional - For service outside N. Y. City  
☐ 5. 4. 3 - Temporary - Where position will exist for  
 months.  
☐ Sec. 243 - Military leave of

Knowing the provisions of Section 95 of the Civil Service  
 Law, and with full knowledge of the responsibility and

*Exhibit "4" Annexed to Answer*

liability placed upon me thereby, I certify that this appointment is properly made under the rule checked above; that I am familiar with the qualifications of the proposed appointee; that I believe the statements made to be true; his character and reputation are satisfactory; he has the requisite knowledge and ability; he meets the minimum education and experience requirements for the position; and that he will perform duties appropriate to his title.

The fingerprints of the appointee have been submitted to the Department of Personnel.

Signature, Appointing Officer HAROLD O. BASDEN Title  
Director of Personnel Date 12/30/70

**SECTION B (Personal History Section)—To be filled in by  
Applicant (Print in ink or type)**

1. Name (First, Middle Initial, Last) *Sylvia Castro*
2. Address (Include Borough and Zip Code No.) *1380  
Merriam Ave. Apt. 3-G Bronx New York 10452*
3. Sex\* ☐ Male ☒ Female
4. Date of Birth\* *June 3, 1944*
5. Describe physical defects or ailments, if any *None*
6. Are you now a bona fide resident of the State of New York? ☒ Yes ☐ No
7. Are you a citizen of the United States? ☐ Yes ☒ No
8. Were you ever removed from or disqualified for any private or public employment? ☐ Yes ☒ No
9. Have you ever been treated for mental disease or been a patient in an institution for treatment of mental disease? ☐ Yes ☒ No

If you answer to questions 8 or 9 is "yes", give full details below.

- \* The New York Law Against Discrimination prohibits discrimination because of age or sex, except where there is a bona fide occupational qualification or a statutory authorization.

*Exhibit "4" Annexed to Answer*

10. Are you a permanent City employee? ☐ Yes ☒ No

10A. If yes, state: Department Title of Per-  
manent Position

## SECTION C—For Department of Personnel

Payroll Division—Approved under Rule 5. 4. 1 for 30 days  
from effective date.

Initials Date Dec 31 1970

Bureau of Examinations ☐ Qualified ☒ Not Qualified  
because *not citizen &* (Illegible)

Initials: (Illegible) Date: 1.7.71

## DECLARATION (To be completed by applicant)

I declare, under penalties of the penal law, that I prepared this side and the reverse side of the Personal History Section of this application and that the statements contained therein are, to the best of my knowledge and belief, true and correct and that I have not knowingly and willfully made a false statement or given information which I know to be false in connection therewith.

Signed SYLVIA CASTRO

Date December 1st, 1970

## EDUCATION Name of School

High School or Trade School (Illegible) Day or Night *Day*  
From Mo. 2 Yr. 1959 to Mo. 11 Yr. 1964 Were You  
Graduated? (Yes or No) Yes Degree Received Total  
Credits Completed Major Subject *General Edu-*  
*cation* No. of Credits in Major

*Public Service* (Illegible) Day or Night *Day* From Mo.  
4-15 Yr. 68 To Mo. 4 Yr. 1969 Were You Graduated  
(Yes or No) (Illegible) Degree Received Total  
Credits Completed Major Subject No. of  
Credits in Major

*Exhibit "4" Annexed to Answer***College or Other School**

**EXPERIENCE:** List in chronological order, starting with your present or most recent position, those positions which tend to qualify you for the position sought. List as a separate employment every material change of duties with the same employer.

- 1 Dates of Employment (Give Month and Year) From 6-16-69 to Present

Exact Title of Your Position *Assistant Counselor*

Salary \$6,700

Number of Hours Work Per Week 35

Name and Address of Employer *M.C.D.A. Region No. 5  
601 West 26th St.*

Nature of Business *Anti-Poverty*

Number and Kind of Employees Supervised By You

If with New York City or State, was this a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Orientation and Assessment.  
Individual Counseling. Group Counseling. Intake.*

- 2 Dates of Employment (Give Month and Year) From 4-15-68 to April, 1969

Exact Title of Your Position *Educational Assistant*

Salary \$70. Wkly.

Number of Hours Work Per Week 35

Name and Address of Employer *Public Service Career  
Program 220 Church St. N.Y.C.*

Nature of Business *Anti Poverty*

*Exhibit "4" Annexed to Answer*

Number and Kind of Employees Supervised By You

If with New York City or State, was this a Provisional Appointment? ☒ Yes ☐ No

Description of Your Work *Assist the Teacher—Tutoring (At School) Basic Education Training in order to get the High School Equivalency Diploma.*

3 Dates of Employment (Give Month and Year) From *4/66 to 4/68*

Exact Title of Your Position *Packer*

Salary *\$64. Wkly.*

Number of Hours Work Per Week *35*

Name and Address of Employer *460 West 34th Street  
New York*

Nature of Business *Factory*

Number and Kind of Employees Supervised By You

If with New York City or State, was this a Provisional Appointment? ☐ Yes ☒ No

Description of Your Work *Packing, General help*

**LICENSE:** If a license or professional registration is required for this position, answer the following:

Title of License You Possess (Valid in N.Y.C.)

License No.

Name of Issuing Agency

Date of Original Issue

Date Last Renewed

Renewal Number (If Any)

Date of Expiration

Present Any Additional Information on a Separate Sheet of This Size and Attach Firmly.

**Affidavit of Harold O. Basden Resubmitted  
in Support of Answer**

(See pp. 31-33, *ante.*)

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**Schedule Annexed to Basden Affidavit Resubmitted  
in Support of Answer**

(See p. 34, *ante.*)

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**Motion for Summary Judgment Dismissing Action**

**THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

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**[S A M E T I T L E]**

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PLEASE TAKE NOTICE that upon the annexed Answer with Exhibits "1" through "4" and upon the affidavit of Harold O. Basden, sworn to April 5, 1971, with Schedule, and upon all the papers and proceedings heretofore had herein, the undersigned will move this Court at Room 129, United States Courthouse, Foley Square, New York, N.Y., on the 13th day of July, 1971 at 4 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard, pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in defendants' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

Dated: New York, N.Y., July 1, 1971.

J. LEE RANKIN  
J. Lee Rankin  
Corporation Counsel  
Attorney for Defendants  
Sugarman and Bronstein

To:

LESTER EVENS, Esq.  
JEFFREY G. STARK, Esq.  
Attorneys for Plaintiffs



**Statement Under Rule 9(g) of the General Rules of  
United States Court for the Southern and Eastern  
Districts of New York**

**THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

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**[SAME TITLE]**

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By their attorney J. Lee Rankin, Corporation Counsel defendants Jule M. Sugarman, Administrator of the N.Y.C. Human Resources Administration, and Harry I. Bronstein, N.Y.C. Personnel Director and Chairman of the N.Y.C. Civil Service Commission, respectfully allege as follows for their statement under Rule 9 (g) of the General Rules of United States Courts for the Southern and Eastern Districts of New York.

1. The named plaintiffs are resident aliens.
2. Plaintiffs came into the City civil service on or about December 28, 1970 when private job training programs sponsored by the Puerto Rican Forum and the Institute for Public Administration were merged with a similar City sponsored program.
3. Plaintiffs were appointed provisionally to competitive class titles within the Manpower Career Development Agency of the N.Y.C. Human Resources Administration.
4. The dates of plaintiffs' entry into the United States, the type of visa issued to them, the provisional titles they held at the N.Y.C. Human Resources Administration, their annual salaries and the dates their names last appeared on the City payroll are as set forth in Schedule submitted

*Statement Under Rule 9(g) of the General Rules of United States Court for the Southern and Eastern Districts of New York*

with defendants' Answer and herewith incorporated by reference.

5. The documents annexed to defendants' Answer as Exhibits "1" through "4" are in fact the "Requests For Approval of Provisional Exceptional, Seasonal, Temporary, or Military Replacement Appointment" submitted to the N.Y.C. Department of Personnel by the plaintiffs.

6. None of the plaintiffs was certified pursuant to 8 U.S.C. § 1182 (a)(14) or related provisions of the Immigration and Nationality Act of 1952 for the position he held in the City civil service or for any similar position in the private sector.

7. From the time of plaintiffs' provisional appointments down to date, no waivers of United States citizenship authorized by Civil Service Law § 53, subd. 2 have been in effect with respect to the competitive class titles in which plaintiffs were employed.

8. Between February 11, 1971 and March 5, 1971, plaintiffs were advised that they were dismissed from the N.Y.C. Human Resources Administration subject to continuation on payroll status until accrued annual leave and compensatory time had been paid.

9. Plaintiffs' dismissals were affected pursuant to N.Y. Civil Service Law § 53 with the exception that plaintiff Castro was dismissed for the additional reason that she lacked sufficient experience to qualify for the position of Senior Human Resources Technician.

*Statement Under Rule 9(g) of the General Rules of United States Court for the Southern and Eastern Districts of New York*

10. Plaintiff Dougall took and passed a competitive examination for the title he held provisionally with the N.Y.C. Human Resources Administration. However, at the time of his dismissal, plaintiff Dougall retained his provisional status.

11. There are eligible lists in existence for all the titles formerly held by the plaintiffs except the title of Typist. An eligible list of this title will be established shortly.

12. The persons whose names appear or will appear on the aforesaid eligible lists are United States citizens and are otherwise fully qualified for appointment.

Respectfully submitted,

J. LEE RANKIN  
J. Lee Rankin  
Corporation Counsel  
Attorney for Defendants  
Sugarman and Bronstein

**Affidavit of Seham el-Araby****THE UNITED STATES DISTRICT COURT,****SOUTHERN DISTRICT OF NEW YORK.**

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**[SAME TITLE]**

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**STATE OF NEW YORK** { ss.:  
**COUNTY OF NEW YORK** }

**SEHAM el-ARABY**, being duly sworn, deposes and says that:

1. Deponent is an alien residing in the United States since July 20, 1968, and presently lives at 67 Eighth Avenue, New York, New York.

2. Until May 28, 1971, deponent was employed as a caseworker for the Department of Social Services of the City of New York, at which time her employment was terminated.

3. On May 26, 1971, deponent received from Jules Sugarman, Commissioner, Human Resources Administration of the Department of Social Services, a letter indicating that deponent's employment with the Department would be terminated on May 28, 1971.

4. On May 26, 1971, deponent filed a complaint with the State Division of Human Rights, charging the Department of Social Services with unlawful discriminatory practices relating to employment by denying her equal terms, conditions and privileges of employment because of her national origin, in violation of the Human Rights Law of the State of New York (case number IC-C-472-71).

*Affidavit of Rajinder Singh*

5. Deponent received on June 25, 1971 from the Division of Human Rights an order marked DETERMINATION AND ORDER AFTER INVESTIGATION on case number ID-C472-71, dismissing her complaint, explaining that deponent could not be reclassified to civil service status because of her Alien status under the requirements set forth by the New York City Civil Service Commission.

(Sworn to by Seham el-Araby on July 12, 1971.)

**Affidavit of Rajinder Singh**

**THE UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

[SAME TITLE]

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

**RAJINDER SINGH**, being duly sworn, deposes and says:

1. That Deponent is an alien lawfully residing in the United States since June 13, 1961, and presently living at 16 Poplar Street, Jersey City, New Jersey.
2. That until May 28, 1971, Deponent was employed as a full-time case worker with the Department of Social Services of the City of New York.
3. That Deponent was informed by Mr. Modell of the Personnel Division of the Department of Social Services

*Affidavit of Rajinder Singh*

in December, 1970, that he could not attain permanent civil service status solely because he was an alien.

4. That because Deponent was a provisional employee without tenure, his employment was terminated on May 28, 1971.

5. That Deponent informed the Department of Social Services of his alien status at the time he was first employed sometime in December, 1968, and filed a certificate of intention to become an American citizen with the United States Department of Immigration and Naturalization, and will become entitled to citizenship sometime in August, 1972.

6. That Deponent fully and satisfactorily performed the duties and responsibilities of his office up to the date of his separation, and that Deponent received an excellent service rating from his supervisor, Mr. Robinson, sometime in November, 1969.

7. That despite reasonable efforts to obtain employment, Deponent has remained unemployed since May 28, 1971.

8. That Deponent's separation was based solely on his alienage and was in no way related to his period of service or to the quality of his performance.

(Sworn to by Rajinder Singh on July 12, 1971.)

**Opinion of Three-Judge Court**  
**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF NEW YORK**

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[S A M E T I T L E]

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*Three Judge Court*  
 J. Edward Lumbard, C. J.  
 Edward C. McLean, D. J.  
 Charles H. Tenney, D. J.

**APPEARANCES:**

**For Plaintiffs:**

**MOBILIZATION FOR YOUTH LEGAL SERVICES, INC.**  
 759—10th Avenue  
 New York, N. Y.

**Lester Evens**

**Jeffrey G. Stark, Esqs.—of Counsel.**

**For Defendants:**

**Louis J. Lefkowitz, Attorney General of the**  
**State of New York**

**Joel Lewittes, Esq., Assistant Attorney General**  
**—of Counsel.**

**J. Lee Rankin, Esq., Corporation Counsel**  
**of The City of New York**

**Municipal Building**

**New York, N. Y.**

**Judith A. Gordon, Esq.—of Counsel.**



*Opinion of Three-Judge Court***TENNEY, District Judge**

Plaintiffs are four of approximately twenty permanent resident aliens who, prior to December 28, 1970, were employed by private organizations which were merged into the New York City Human Resources Administration on that date. The City program was directed to the improvement of job skills among the unemployed and the underemployed. When the private organizations were merged into the City program, plaintiffs were hired by the City assured their positions and salaries would be the same.<sup>1</sup> Shortly after their City employment commenced, however, plaintiffs were discharged pursuant to New York Civil Service Law § 53.1 (McKinney 1959), solely because of their alienage.<sup>2</sup>

On May 11, 1971, by order to show cause plaintiffs, alleging that Section 53 violated the Equal Protection Clause of the fourteenth amendment, the Supremacy Clause of the Constitution, and their right to travel among the states,<sup>3</sup> moved for the convening of a three-judge court and other relief. The single district judge found plaintiffs raised a substantial constitutional question and recommended the convening of a three-judge court. Pursuant to the May 26, 1971 order of Chief Judge Henry J. Friendly, plaintiff's motions for declaratory judgment, injunctive relief and determination of class action<sup>4</sup> were submitted to this statutory three-judge court which heard argument on July 13, 1971.<sup>5</sup>

The issues raised by the instant action were recently the subjects of *Graham v. Richardson*, 403 U. S. 365 (1971), in which the Supreme Court held that state laws conditioning welfare assistance either on United States citizenship or, if the beneficiary was an alien, upon his having resided in the United States for a specified number of years were invalid. The rationale and holding of *Graham* control the outcome of plaintiffs' challenge to Section 53.

*Opinion of Three-Judge Court*

The fourteenth amendment provides "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws", and the Equal Protection Clause has long been held to apply to aliens as well as citizens. *E.g.*, *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). Of course, a state has traditionally been permitted to make classifications provided these have a reasonable basis. *E.g.*, *Dandridge v. Williams*, 397 U. S. 471, 485 (1970). Nevertheless, when a state's classification either impinges upon a fundamental right, *Shapiro v. Thompson*, 394 U. S. 618 (1969), or is based upon an inherently suspect classification such as race, nationality or alienage, that classification is subject to "close judicial scrutiny". *Graham, supra* at 372. Inasmuch as defendants have failed to demonstrate a compelling interest which would justify the classification created by Section 53, the statute violates the Equal Protection Clause of the fourteenth amendment.

The City and State attempt to justify their refusal to allow aliens the opportunity to compete for employment in the competitive class of civil service (hereinafter referred to as "CCCS") on two grounds: (1) a government is entitled to conduct its affairs through the agency of persons with undivided loyalty, and (2) Section 53 is properly related to efficient and stable government administration.

Since defendants neither elaborate on their loyalty argument nor contend that aliens, as persons with dual allegiance, are security risks,\* it would appear that this justification is an application of the special public interest doctrine which is a phrase to describe the state's restricting the distribution of its limited resources to its own citizens. "*Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948), however, cast doubt on the continuing validity of the special public interest doctrine in all contexts." *Graham, supra* at 374 (emphasis supplied); accord, *Purdy*

*Opinion of Three-Judge Court*

*& Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P.2d 645, 657-58 (1969).

The Court in *Graham, supra* at 374, concluded that an alien's constitutional right to equal protection could not be made to depend upon the concept that government benefits were a privilege, not a right, which is the basis of the special public interest doctrine, see *People v. Crane*, 214 N.Y. 154, 164, 108 N.E. 427, 430, *aff'd*, 239 U. S. 195 (1915), especially since resident aliens are subject to the same obligations as citizens, such as taxes and military service. *Accord, Purdy & Fitzpatrick*, 456 P.2d at 656. The arbitrariness and unfairness of denying aliens the employment benefits of the City and State are even more apparent when one realizes that an alien who may have resided in New York for a number of years and contributed to its growth and development is denied the opportunity to compete for employment in CCCS whereas any *United States citizen* (vis-a-vis an American citizen residing in New York) who may not be or have ever been a New York resident and, accordingly, may not have made any contribution to it, is eligible for such employment. *Purdy & Fitzpatrick*, 456 P.2d at 656. Therefore, without a showing by defendants that the "loyalty" requirement bears a relationship to a compelling interest of the City and State, it violates the Equal Protection Clause.

The second justification for Section 53—that it is properly related to efficient and stable government administration—also does not withstand "close judicial scrutiny". Defendants contend that an alien is less likely to remain in the United States during his employment life than is an American citizen and, thus, if an alien is hired into a "career" position of CCCS, a decision to return to his homeland will adversely affect the efficiency and stability of the administration of the governments of the City and State. However, this argument of defendants is inap-

*Opinion of Three-Judge Court*

posite since it is primarily concerned with whether or not a "career" employee is likely to remain in the United States rather than in New York. There is no offer of proof on this issue and defendants would be hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years, as have plaintiffs, and whose family also resides here, would be a poorer risk for a career position in New York (vis-a-vis in the United States) than an American citizen who, prior to his employment with the City or State, had been residing in another state. Judicial notice can be taken of the mobility of today's society and of the numerous persons who flock to places such as New York City and Washington, D.C. for relatively short stays in order to gain valuable experience through government employment or for the adventure and glamour those cities offer. Inasmuch as the defendants do not attempt to distinguish among United States citizens in their hiring of "career" employees, their argument for discriminating against aliens is not valid. Assuming, *arguendo*, that it were valid, it still cannot withstand the requirements of the fourteenth amendment as enunciated in *Graham*.

This efficiency argument of the City and State is an economic one—if the defendants hire aliens into career positions and the aliens eventually quit and return to their homelands, new employees will have to be hired and trained to replace the experienced and therefore more efficient departed aliens; all of which costs defendants money. Again, however, as pointed out above in response to the "loyalty" argument, aliens pay taxes and often contribute to the welfare of the city and state in which they reside—certainly more than do American citizens residing in another state or section of the country and, therefore, discriminating against aliens on economic grounds is particularly inappropriate. Furthermore, a state may

*Opinion of Three-Judge Court*

not attempt to limit expenditures by creating invidious distinctions among persons within the state without violating the Equal Protection Clause, and the Supreme Court in *Graham, supra* at 375, so held: "[A] concern for fiscal integrity is no . . . justification for the questioned classification in these cases. . . ."

Although *Graham* did not explicitly overrule two early Supreme Court cases, *Crane v. New York*, 239 U.S. 195 (1915); *Heim v. McCall*, 239 U.S. 175 (1915), which are admittedly factually similar to the instant action and which upheld a New York statute prohibiting employment of aliens on public works, they are no longer controlling. In *Purdy & Fitzpatrick, supra*, the California Supreme Court was faced with a challenge to a statute virtually identical to that in *Crane* and *Heim* and unanimously held that the statute was violative of the Equal Protection Clause. In doing so, the court concluded that the original basis for the result in *Heim* was invalid and that recent developments in the law of equal protection had removed whatever validity *Heim* had at the time of its decision and that *Takahashi* warranted the rejection of such cases as *Heim* and *Crane*. If there were any doubt about the legitimacy of that California decision, it should have been put to rest by *Graham* which also strongly criticized the rationale of *Crane* and *Heim* and rejected it as a basis for denying welfare benefits to aliens. Taken together, *Graham* and *Takahashi* sufficiently weaken the value of *Crane* and *Heim* as precedents for upholding state laws denying aliens government employment and, therefore, those cases can be viewed as implicitly overruled and no longer law. That *Graham* did not explicitly overrule *Crane* and *Heim* can be viewed only as reflecting an intention to defer such action until faced with a proper factual setting in which states were given an opportunity to present their justifications for denying aliens employment opportunities. We are now faced with

*Opinion of Three-Judge Court*

such a case and the City and State have failed to offer sufficient justification for Section 53; accordingly, we have adopted the reasoning of *Graham* and hold Section 53 violative of the Equal Protection Clause.

In the opinion of this Court, Section 53 is also unconstitutional because it conflicts with the Supremacy Clause of the Constitution. Specifically, Congress has enacted a comprehensive plan for the regulation of immigration and naturalization and has granted to aliens through 42 U.S.C. § 1981 (1970) 'the full and equal benefits of all laws in this country. "Moreover . . . [the Supreme] Court had made it clear that . . . aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminating laws.' *Takahashi*, 334 U.S. at 420." *Graham*, *supra* at 377-78. Relying on these premises, the court in *Graham* concluded that state laws restricting the eligibility of aliens for welfare assistance solely because of their alienage conflicted with the federal policy and hence were unconstitutional. Section 53 is invalid for the same reasons.

In *Truax v. Raich*, 239 U.S. 33, 42 (1915), the court reasoned:

"The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission,

*Opinion of Three-Judge Court*

would be segregated in such of the States as chose to offer hospitality." *Accord, Graham, supra* at 14.

In quoting the above language from *Truax* with approval, the court in *Graham, supra* at 380, held:

"State alien residency requirements, that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible."

Just as the laws in *Truax*<sup>8</sup> and *Graham* equated with a right in the states to admit and exclude aliens, an exclusively federal right, Section 53 encroaches upon this exclusively federal power and denies aliens the "full and equal benefit of all laws for the security of persons and property." Since the federal government has preempted the field in the case of denying aliens welfare assistance, it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned upon long-term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Section 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens.



*Opinion of Three-Judge Court*

In sum, Section 53 is tantamount to an assertion by New York City and the State of New York of the right to deny aliens entrance and abode—a right that is exclusively federal. Furthermore, Section 53 is clearly violative of 42 U.S.C. § 1981 (1970) in that it denies aliens the equal benefits of the laws of New York as are enjoyed by white citizens. In light of the language of *Graham*, this Court is constrained to find that Section 53 also conflicts with the Supremacy Clause and is unconstitutional, and enforcement of it will be enjoined.

Accordingly, plaintiff's motion for class action, preliminary and permanent injunctive and declaratory relief is hereby granted.

Settle order on notice.

Dated: New York, New York, November 9, 1971.

J. EDWARD LUMBARD  
C.J.

EDWARD C. McLEAN  
D.J.

CHARLES H. TENNEY  
D.J.

*Opinion of Three-Judge Court*

LUMBARD, *Circuit Judge* (concurring)

I concur in Judge Tenney's opinion. The city and state have offered no justification for New York Civil Service Law § 53 that can stand in light of the Supreme Court's opinion in *Graham v. Richardson*, 403 U.S. 365 (1971). I think that the "special public interest" doctrine and the Court's earlier decisions in *Heim v. McCall*, 239 U.S. 175 (1915), and *Crane v. New York*, 239 U.S. 195 (1915), can no longer be viewed as controlling in light of the Court's language in *Graham v. Richardson*, *supra*, and *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948). Not only does Section 53 run afoul of the Equal Protection Clause, but it conflicts both with 42 U.S.C. § 1981 (1970) and the federal government's general power over the immigration and naturalization of aliens. See *Graham v. Richardson*, *supra*, at 376-80.

While the question we decide today is an important one, it is equally important to recognize those areas into which the Court's holding does not extend. Nothing in our decision should be construed to mean that a state may not lawfully maintain a citizenship requirement for those positions where citizenship bears some rational relationship to the special demands of the particular position. There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and the city, and their citizens, may properly require the officeholders to be a United States citizen.

*Opinion of Three-Judge Court*

Patrick Mc L. Dougall, Esperanza Jorge, Teresa Vargas,  
and Sulvia Castro, individually and on behalf of all  
persons similarly situated, Plaintiffs,

against

Jule M. Sugarman, Administrator of New York City  
Human Resources Administration and Harry I. Bron-  
stein, City Director of Personnel and Chairman of the  
New York City Civil Service Commission, Defendants.

71 CIVIL 992

## FOOTNOTES

<sup>1</sup> Pg. 2. Plaintiffs Jorge and Vargas were employed as clerk-typists; plaintiff Castro as a senior human resources technician; and plaintiff Dougall as an administrative assistant in the staff development unit.

<sup>2</sup> Pg. 2. Section 53.1 provides:

"Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

<sup>3</sup> Pg. 2. We have not found it necessary to reach the question whether aliens have a constitutional right to travel among the states.

<sup>4</sup> Pg. 2. Plaintiffs' motion for class action determination is granted; the class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of Civil Service.

<sup>5</sup> Pg. 2. Jurisdiction of this court is based upon 28 U.S.C. § 1343(3) and (4). Reference is also made to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 2201, 2281 and 2284.

<sup>6</sup> Pg. 4. Defendants would be on particularly shaky ground if they were to argue that aliens were ineligible for employment in CCCS because they are security risks. In fact, defendant argued in support of Section 53's validity that plaintiffs, as aliens, were eligible for other government employment in the generally higher paying and more responsible appointive positions, as well as in the labor class. E.g., N.Y. Civil Service Law §§ 35, 41, 42 and 43 (McKinney 1959). Furthermore, Section 53.2 specifically allows the state to temporarily waive the citizenship requirements during a shortage of qualified

### Opinion of Three-Judge Court

citizens. In light of the availability of more responsible positions to aliens and that defendants may waive the citizenship requirements when it suits their needs, it would be incongruous to contend that aliens were denied employment in CCCS because their dual allegiance constituted a security risk to the City and State.

<sup>7</sup> Pg. 8. 42 U.S.C. § 1981 (1970) provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

This provision was previously 8 U.S.C. § 41, a section of that title of the United States Code dealing with Aliens and Nationality. It is also clear that 8 U.S.C. § 41 extended to aliens as well as citizens. *Takahashi*, 334 U.S. at 419.

<sup>8</sup> Pg. 10. There is language in *Truax*, 239 U.S. at 41, which implies that states may deny some employment opportunities to aliens without invading this exclusive federal authority as long as it does not foreclose nearly the entire field of industry. Defendants then argue that since they employ only about 5 per cent of the state workforce, Section 53 is valid. However, the facts of *Sailor v. Loser*, the companion case to *Graham*, clearly demonstrate that a state law need have very little actual impact on aliens before it constitutes an impermissible encroachment upon the exclusive federal power to admit and exclude aliens. In *Sailor*, the class of persons actually affected by the denial of welfare assistance represented only 65-70 cases annually. Certainly Section 53 imposes at least as great an obstacle to the entrance and abode of aliens as did the statute in *Sailor*, since there are apparently in excess of 500,000 aliens residing in New York. *Plaintiffs' Brief* at 7.

## Order of Three-Judge Court

UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

---

[S A M E T I T L E]

---

### *Three-Judge Court*

J. Edward Lumbard, C.J.,  
Edward C. McLean, D.J.  
Charles H. Tenney, D.J.

This cause having come to be heard before a statutory three-judge court convened pursuant to 28 U.S.C. § 2281 by order of the Honorable Henry J. Friendly, Chief Judge of the Second Circuit Court of Appeals, dated May 26, 1971, and consisting of the Honorable J. Edward Lumbard, Circuit Judge, the Honorable Edward C. McLean, District Judge, and the Honorable Charles H. Tenney, District Judge, on plaintiffs' motion for an order determining that this action may proceed as a class action declaring N.Y. Civil Service Law § 53 unconstitutional and enjoining enforcement thereof, and the three-judge court having considered the pleadings, affidavits and briefs submitted on behalf of the parties, having heard oral argument on July 13, 1971, and having rendered its decision in an opinion dated November 9, 1971, it is

ORDERED that plaintiffs Dougall, Jorge and Vargas are representatives of a class consisting of all permanent resident aliens who, but for the enforcement of N.Y. Civil Service Law § 53, would otherwise be eligible to compete for employment in the competitive class of civil service; and it is further

*Order of Three-Judge Court*

ORDERED that N.Y. Civil Service Law § 53 is declared unconstitutional; and it is further

ORDERED that defendants, their successors in office, agents and employees and all other persons in active concert with them are permanently enjoined from enforcing N.Y. Civil Service Law § 53; and it is further

ORDERED that this three-judge court is hereby dissolved and all claims for relief are remanded to the single district judge to whom the motion for the convening of a three-judge court was originally presented, the Honorable Charles H. Tenney; and it is further

ORDERED that execution of this order is stayed pending a timely appeal by the defendants to the United States Supreme Court.

Dated: New York, New York, December 23, 1971.

J. EDWARD LUMBARD, C.J.

EDWARD C. McLEAN, D.J.

CHARLES H. TENNY, D.J.

**Notice of Appeal of Municipal Defendants**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

---

[S A M E T I T L E]

---

NOTICE OF APPEAL TO THE SUPREME COURT OF  
THE UNITED STATES

SIRS:

PLEASE TAKE NOTICE that the defendants, JULE M. SUGARMAN, Administrator of New York City Human Resources Administration, and HARRY I. BRONSTEIN, City Director of Personnel and Chairman of the New York City Civil Service Commission hereby appeal to the Supreme Court of the United States from the order of Three Judge Court, dated the 23rd day of December 1971 and entered in the office of the Clerk of the United States District Court, Southern District of New York on the same day which, among other things, declared N.Y. Civil Service Law, Section 53 unconstitutional and directed that the defendants, their successors in office, agents and employees and all other persons in active concert with them are permanently enjoined from enforcing N.Y. Civil Service Law, Section 53, and dissolved the three-judge court and remanded the matter to the single district judge to whom the motion for the convening of a three-judge court was originally presented, and the said defendants hereby appeal from each and every part of said order except so much as stays the execution of the order.

The order was entered on December 23rd, 1971.



*Notice of Appeal of Municipal Defendants*

This appeal is taken pursuant to 28 U.S.C. Section 1253.

Dated: New York, January 19th, 1972.

Yours, etc.

J. LEE RANKIN  
*Corporation Counsel  
of The City of New York  
Attorney for Defendants  
Sugarman and Bronstein  
Office and P.O. Address  
Municipal Building  
Borough of Manhattan  
New York, N. Y. 10007*

To:

M.F.Y. LEGAL SERVICES, INC.  
LESTER EVENS, JEFFERY G. STARK, Esqs.  
759 Tenth Ave.  
New York, N. Y.  
*Attorney for Plaintiffs*

HON. LOUIS J. LEFKOWITZ  
*Attorney General of the State of New York  
Attorney for State of New York  
Joel Lewittes, Esq., Asst. Atty. General  
80 Centre St.  
New York, N. Y. 10013*

**Notice of Appeal of Attorney General of the  
State of New York**

**UNITED STATES DISTRICT COURT,  
SOUTHERN DISTRICT OF NEW YORK.**

---

**[SAME TITLE]**

---

**NOTICE OF APPEAL TO THE SUPREME COURT OF  
THE UNITED STATES**

Notice is hereby given to the plaintiffs above-named that LOUIS J. LEFKOWITZ, Attorney General of the State of New York, hereby appeals to the Supreme Court of the United States from the final order granting plaintiffs' motion for class action, preliminary and permanent injunctive and declaratory relief entered in this action on December 23, 1971.

The appeal is taken pursuant to 28 U.S.C. § 1253.

**LOUIS J. LEFKOWITZ**  
Attorney General of the  
State of New York  
By

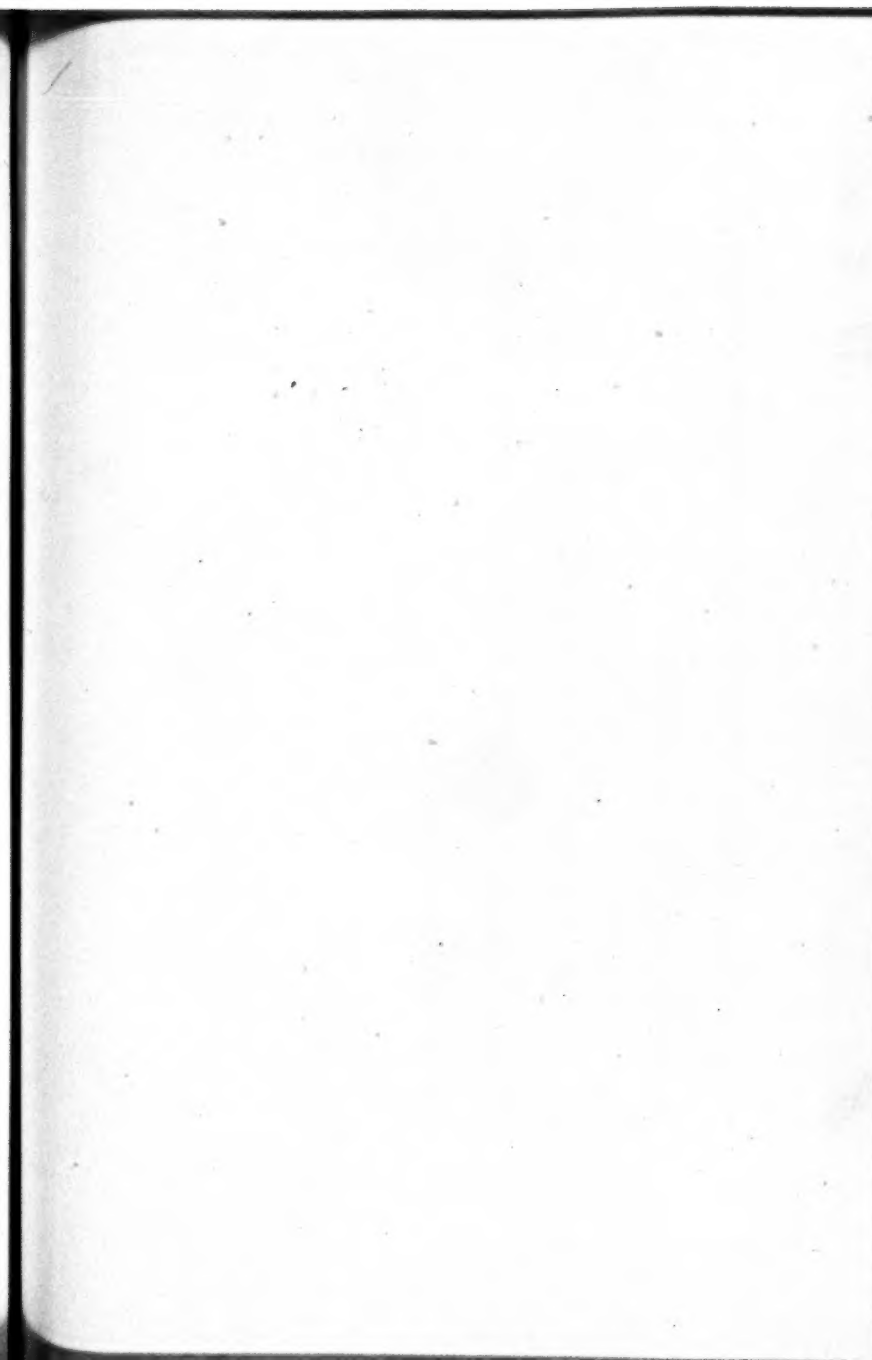
**JOEL LEWITTES**  
Assistant Attorney General  
80 Centre Street  
New York, New York 10013  
Tel. No. (212) 488-3284

*Notice of Appeal of Attorney General of the  
State of New York*

To:

**MOBILIZATION FOR YOUTH LEGAL SERVICES, INC.**  
**Attorneys for Plaintiffs**  
**759 Tenth Avenue**  
**New York, New York**

**HON. J. LEE RANKIN**  
**Corporation Counsel of the City of New York**  
**Attorney for Defendants**  
**Municipal Building**  
**New York, New York 10007**  
**Att: Judith A. Gordon, Esq.**  
**Assistant Corporation Counsel**



**COPY**

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1971

Supreme Court, U. S.  
FILED

MAR 24 1972

\_\_\_\_\_  
No.  
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MICHAEL RODAK, JR., CLE

JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK MC. L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**JURISDICTIONAL STATEMENT  
OF THE STATE OF NEW YORK**

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
*Attorney for Appellants*  
80 Centre Street  
New York, New York 10013

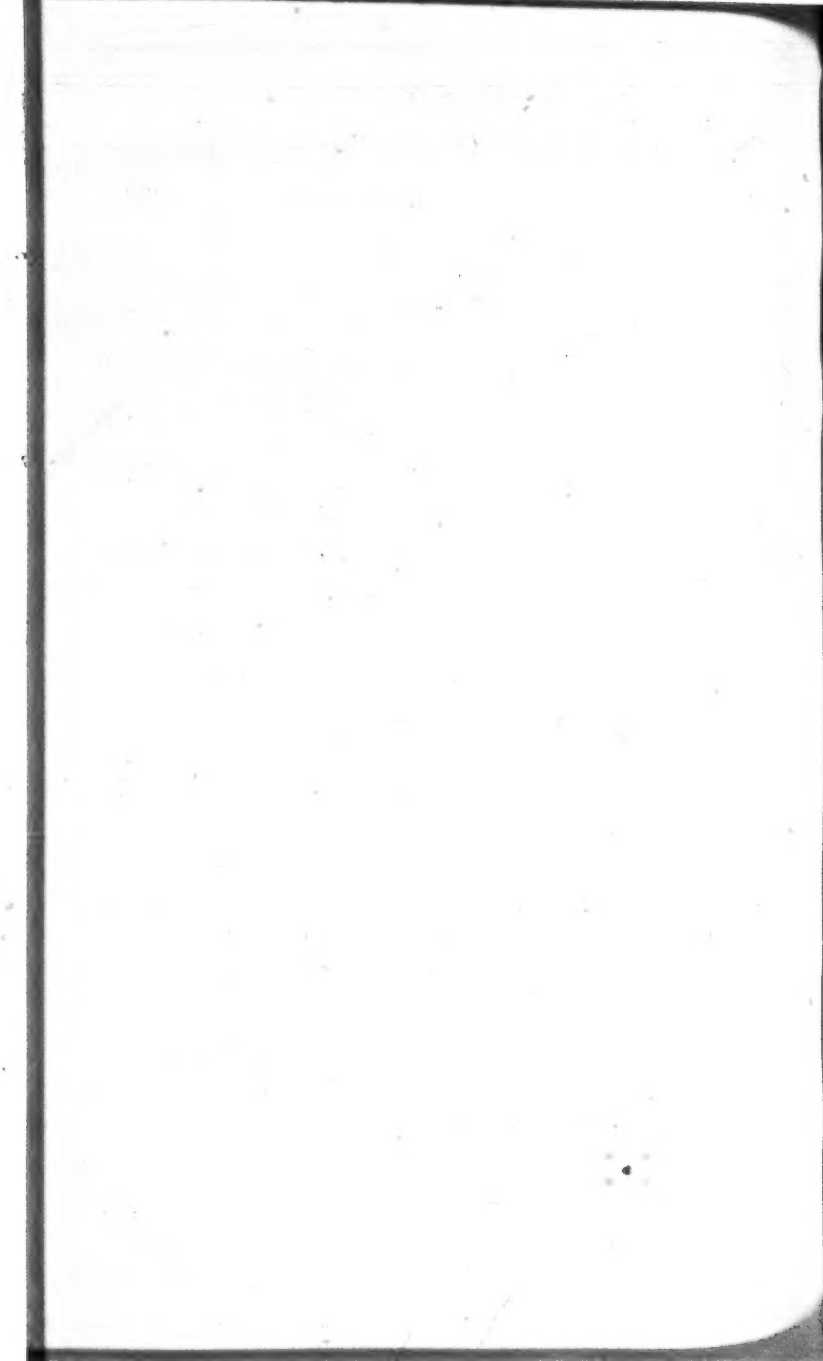
SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

JOEL LEWITTES

JUDITH A. GORDON

Assistant Attorneys General  
*of Counsel*

RESPONSE NOT PRINTED



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IN SENATE,  
January 10, 1907.

REPORT  
OF THE  
COMMISSIONER OF THE  
LAND OFFICE,  
FOR THE YEAR 1906.

AND  
OF THE  
LAND OFFICE,  
FOR THE YEAR 1906.

BY  
J. W. HARRIS,

COMMISSIONER.

RECEIVED

AT THE

STATE

OF TEXAS

ON

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10TH

DAY

OF

JANUARY

1907.

AT THE

STATE

OF TEXAS.

BY



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

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No.

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JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK MO. L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

---

**JURISDICTIONAL STATEMENT  
OF THE STATE OF NEW YORK**

The State of New York appeals from an order of the United States District Court for the Southern District of New York (statutory three-judge court), entered on December 23, 1971, declaring New York Civil Service Law § 53 unconstitutional under the Equal Protection Clause of the Fourteenth Amendment on the ground that the statute prevents aliens from competing for positions in the career civil service on same terms as citizens and under the Supremacy Clause, Article VI, Clause 2, on the ground that the statute conflicts with a comprehensive plan for the

regulation of immigration and naturalization enacted by Congress. The three-judge district court enjoined the enforcement of § 53 but stayed its order pending appeal to this Court.

### **Opinions Below**

The opinion and order of the single district judge (unreported), dated May 24, 1971, convening a three-judge court is reproduced herein as Appendix "A". The opinion of the three-judge district court (unreported), dated November 9, 1971, is reproduced herein as Appendix "B". The order of the three-judge district court, dated December 23, 1971, is reproduced herein as Appendix "C". There are no separate findings of fact and conclusions of law.

### **Jurisdiction**

The jurisdiction of this Court to review the instant case is conferred by 28 U.S.C. § 1253.

The order of the three-judge district court was filed on December 23, 1971. The State of New York filed a Notice of Appeal on January 19, 1972 in the United States District Court for the Southern District of New York. The Notice of Appeal is reproduced herein as Appendix "D".

Jurisdiction of the district court was conferred by 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. §§ 1343(3)(4), 2201, 2281, 2284.

### **Statute Involved**

New York Civil Service Law § 53 states:

#### *"Citizenship Requirements*

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in

the competitive class unless he is a citizen of the United States.

2. Notwithstanding any of the provisions of this chapter or of any other law, whenever a department head or appointing authority deems that an acute shortage of employees exists in any particular class or classes of positions by reason of a lack of a sufficient number of qualified personnel available for recruitment, he may present evidence thereof to the state or municipal civil service commission having jurisdiction which, after due inquiry, may determine the existence of such shortage and waive the citizenship requirement for appointment to such class or classes of positions. The state commission or such municipal commission, as the case may be, shall annually review each such waiver of the citizenship requirement, and shall revoke any such waiver whenever it finds that a shortage no longer exists. A non-citizen appointed pursuant to the provisions of this section shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship.

### **Questions Presented**

1. Whether N.Y. Civil Service Law § 53 bears an appropriate relationship to the state interests involved in the employment of career civil service personnel?
2. Whether the district court applied the correct standard under the Equal Protection Clause in requiring that § 53 be supported by a compelling state interest?
3. Whether § 53 conflicts with a comprehensive federal plan for the regulation of immigration and naturalization of aliens?

4. Whether § 53 erects an obstacle to aliens' entering and abiding within the State of New York inconsistent with federal policy?

### Statement of the Case

Claiming violation of their Fourteenth Amendment rights, their right to interstate travel and contravention of the federal power to regulate aliens, appellees brought this action for declaratory and injunctive relief and damages. An order determining that the action could be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure was sought. Jurisdiction of the district court was alleged under 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. § 1331, 1343(3)(4), 2201, 2202.

The action was commenced by service of summons and complaint upon the Municipal Appellants on March 5, 1971. An amended complaint was served on the Municipal Appellants on March 16, 1971.

The gravamen of the amended complaint was that the State of New York could not, consistently with Fourteenth Amendment standards, distinguish among applicants for career civil service positions on the basis of United States citizenship and that in doing so, the State had infringed the alien appellees' right to travel and to enter and abide within New York State. The amended complaint further alleged that the power to regulate the activities of aliens was vested exclusively in the United States Congress, and, alternatively, that the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, had pre-empted state regulation in this field.

When the action was commenced, the named Appellees had been employed in the New York City Civil Service for approximately three months and had been advised by the local appointing authority (the N.Y.C. Human Resources Administration) that their employment was terminated

subject to retention on payroll until accrued leave balances had been paid.

The action terminating the named Appellees was taken pursuant to N.Y. Civil Service Law § 53, subd. 1.\* The named Appellees, with sixteen other aliens who were similarly terminated, entered the City Civil Service in December 28, 1971 when two privately sponsored job training programs in which they were employed were merged with a similar city program. The city program was administered by the N.Y.C. Human Resources Administration, and the group of twenty were appointed provisionally† to competitive class civil service titles utilized by that Administration. N.Y. Civil Service Law § 44. Their duties ranged from administering the program (Appellee Dougall) to semi-professional counselling (Appellee Castro) to clerical (Appellees Jorge and Vargas).

Shortly after their civil service employment commenced, a routine personnel investigation disclosed the alien status of the named Appellees and the sixteen others similarly employed. Their provisional appointments were then revoked and their services terminated.

By Order to Show Cause, signed March 5, 1971 and returnable March 9, 1971, the named Appellees moved for a temporary restraining order under 28 U.S.C. § 2284(3), the convening of a three-judge district court under 28 U.S.C. §§ 2291, 2284 and for an order determining that the

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\* An exception is noted with respect to Appellee Castro: She was terminated for the additional reason that she lacked sufficient experience to qualify for the civil service position she held.

† N.Y. Civil Service Law § 65, subd. 1, authorizes interim, or provisional, appointments to the competitive class when appropriate eligible lists are not available to fill vacancies. No competitive examination is required. Provisional employees are subject to dismissal at the will of the appointing authority. *Matter of Koso v. Green*, 260 N.Y. 491 (1933); *Matter of Rohl v. Jeacock*, 259 App. Div. 208 (Fourth Dept. 1940), aff'd 284 N.Y. 660 (1940); *Matter of Poss v. Kern*, 263 App. Div. 320 (First Dept. 1942).

action could proceed as a class action under Rule 23 of the Federal Rules of Civil Procedure.

The Municipal Appellants opposed the motion on the grounds that no irreparable injury had been shown, that no substantial federal question was presented and that the class action issue should be referred to the three-judge court in the event one was convened and, alternatively, that Appellees' allegations with respect to the class did not meet the requirements of F.R.C.P. Rule 23. By Notice of Motion, dated April 5, 1971, the Municipal Appellants moved to dismiss the action under F.R.C.P. Rule 12(b)(1) on the ground that the court lacked jurisdiction over the subject matter.

Both motions were submitted to the Hon. Charles H. Tenney on May 4, 1971. In his opinion dated May 24, 1971, the single district judge held that subject matter jurisdiction was conferred by 28 U.S.C. 1343(3). Relying principally on *Purdy & Fitzpatrick Co.*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), wherein the California Supreme Court declared a state statute prohibiting the employment by contractors of aliens on public work projects unconstitutional, the single judge held further that substantial federal questions involving the Equal Protection Clause and the Congressional scheme for immigration and naturalization were presented requiring a three-judge court. The single judge did not issue a temporary restraining order and did not rule on the class action aspects of the motion.

The three-judge court designated by order of the Chief Judge of the United States Court of Appeals for the Second Circuit consisted of Circuit Judge J. Edward Lumbard and District Judge Edward C. McLean and Judge Tenney. On June 7, 1971, pursuant to 28 U.S.C. §§ 2281, 2284, the State of New York was advised that the action challenging the constitutionality of § 53 was pending before the three-judge court. The Attorney General of the State of New York thereupon appeared in opposition to the con-

tentions of the Appellees. The case was heard on July 13, 1971.

On November 9, 1971, the three-judge district court rendered its opinion declaring N.Y. Civil Service Law § 53 unconstitutional and granting Appellees preliminary and permanent injunctive relief.\* Circuit Judge Lumbard rendered an additional, concurring opinion.

The three-judge court opinion follows from the initial premise that the "rationale and holding" of *Graham v. Richardson*, 403 U.S. 365 (1971), "control the outcome" of Appellees' challenge to § 53.

The court first considered the classification between citizens and aliens embodied in § 53 under the Equal Protection Clause. Citing *Graham v. Richardson*, *supra* at 372, for the principle that classifications based on alienage are "subject to close judicial scrutiny", the court held that § 53 could not be sustained under the Equal Protection Clause unless it was supported by a compelling state interest. Applying this standard, the court examined two state interests: whether (1) the government is entitled to conduct its affairs through the agency of persons with undivided allegiance; and whether (2) the distinction between citizens and aliens for career civil service positions is properly related to efficient and stable government administration.

The court treated the first interest as requiring a showing that aliens are security risks and found that Appellants failed to sustain this burden. In an apparent effort to turn this alleged failure of proof into a point of law, in

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\* The court also granted Appellees' motion for an order determining that the action could be maintained as a class action. The court held that "the class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of Civil Service." Footnote



footnote 6 to the opinion, the court refers to the availability of other classes of public employment to aliens (e.g. N.Y. Civil Service Law §§ 41, 42) and the waiver provisions of subdivision 2 of § 53 stating: "Defendants would be on particularly shaky ground if they were to argue that aliens are ineligible for employment in [the competitive class of the civil service] because they are security risks." The court then concluded that the state's interest in employing persons of undivided allegiance in the career service was merely a restatement of the "special public interest doctrine" rejected by this Court in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948) and *Graham v. Richardson*, *supra*. In those cases, the interests advanced by the states were limited to the preservation of state resources for the benefit of citizens in preference to aliens.

The court also treated the second interest in economic terms. Characterizing the Appellants' argument as limited to the state's fiscal interest in hiring and training new employees to replace departing aliens, the court noted that there was no offer of proof on the question of whether an alien was more likely to depart the United States or the state than was a citizen to depart the state. Nonetheless, the court proceeded to compare the risk to the career service from the permanent resident alien who has resided in the state "for a number of years" and "whose family resides here" (although no proof was offered by Appellees on the latter point) with that of the recent citizen resident and finds that the citizen resident is not a better risk.\* The court then assumes the comparison in Appellants' favor but still finds that the requirements of the Equal Protection Clause are not met presumably relying on its view that *Graham v. Richardson*, *supra*, mandates the application of the compelling state interest test.

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\* The court does not limit its holding on § 53 to the constitutionality of the statute as applied to permanent resident aliens. Rather, the statute is declared unconstitutional on its face and its enforcement is enjoined without exception.

Turning to consideration of the paramount federal power over the regulation of aliens, the court held that § 53 conflicted with the Supremacy Clause of the Constitution. In support of its position, the court cites the "comprehensive plan for the regulation of immigration and naturalization" enacted by Congress (presumably referring to the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* and 42 U.S.C. § 1981\*) and the federal policy forbidding a state to deny entrance and abode to aliens lawfully admitted to the United States. *Truax v. Raich*, 239 U.S. 33, 42 (1915). Without further discussion of how § 53 conflicts with the alleged comprehensive federal plan and what actual impact, if any, § 53 has on an alien's entry and abode in the State of New York†, the court simply assumes the facts necessary to support its conclusions:

"Since the federal government has pre-empted the field in the case of denying aliens welfare assistance, it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned on long term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Sec-

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\* 42 U.S.C. § 1981 does not prevent a state from enacting laws applicable exclusively to alien residents. *Takahashi v. Fish & Game Commission*, *supra* at 420.

† At footnote 8 of its opinion, the court cites *Sailer v. Leger*, the companion case to *Graham v. Richardson*, for the proposition that "very little actual impact" is necessary before a state statute contravenes the exclusive federal power to admit and exclude aliens. The court fails to take note of the stipulation in the *Sailer* record which states: "[T]he denial of general assistance to aliens otherwise eligible for such assistance causes undue hardship to them depriving them of the means to secure the necessities of life, including food, clothing and shelter" and that "the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs." *Graham v. Richardson*, *supra* at 370.

tion 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens."

In his concurring opinion, Judge Lumbard described the area to which the court's opinion did not extend as "those positions where citizenship bears some rational relationship to the special demands of the particular position." He continued: "There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and city, and their citizens, may properly require the officeholder to be a United States citizen."

Assuming that Judge Lumbard was not concerned with aliens who were security risks, his opinion is difficult to reconcile with that of the court. First, he appears to accept the traditional reasonable relation standard as applicable to classifications based on alienage. Second, if the interest of the state in limiting competitive class employment to citizens is merely an economic one, as the court holds, it is difficult to see how that interest is justified by enlarging the employee's scope of responsibility.\*

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\* Although the court characterizes the positions in public employment available to aliens (e.g. N.Y. Civil Service Law §§ 41, 42) as "more responsible" than competitive class positions at footnote 6 of its opinion, there is no evidence in the record to support this proposition. In fact, the competitive class includes highly responsible positions such as attorneys. Conversely, the exempt (§ 41) and non-competitive (§ 42) classes include positions with minimal responsibility. For example, a clerical assistant may be assigned to exempt class and a dishwasher, to the non-competitive class.

## Argument

This case touches the core of government—the identity of the rulers of the people. *Graham v. Richardson*, 403 U.S. 365 (1971), was concerned with securing the necessities of life for the alien poor and the state interest in limiting welfare expenditures by excluding aliens. Relying on an overly broad interpretation of *Graham* and considering that the state interest in § 53 was solely an economic one, the district court has erroneously required that aliens be treated identically with citizens in career civil service employment. The opinion of the district court, if upheld, mandates states and localities to turn over a share of their governments to aliens. The serious implications of this course of action must be considered and the misconception of the district court as to the all-embracing effect of *Graham v. Richardson* recognized and corrected.

1. N. Y. Civil Service Law § 53 bears an appropriate relationship to the state interests involved in the employment of career civil service personnel. To execute the policies of the executive branch, state and local governments cannot be required to employ persons who are presumed by law to have an allegiance to a foreign government. Nor can state and local governments be required to employ persons who cannot be relied upon to remain for the career service period.

The exclusion of aliens from public employment is practically universal.\* Roth *The Minimum Standard of International Law Applied to Aliens* 151-152 (1949); (hereinafter "Roth"); United Nations Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices*

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\* It appears that every civilized country except Ethiopia excludes aliens from civil service employment. *Jalil v. Hampton*, — F.2d — (D. C. Cir. March 8, 1972), slip op. at p. 11, n. 3.

(1966). Indeed, the practice of the federal government is substantially identical with that of New York State under § 53.\* The federal legislation and regulations were recently sustained in *Mow Sun Wong v. Hampton*, (N.D. Calif., No. C-70 2730RFP Aug. 30, 1971 appeal pending C.A. 9, No. 70-2730). See also *Jalil v. Hampton*, *supra*.

The exclusion of aliens from public service is based on two accepted principles completely unrelated to fiscal matters: the government is entitled to conduct its affairs through the agency of persons with undivided allegiance, *People v. Crane*, 214 N.Y. 154 (1915), *aff'd sub. nom. Crane v. New York*, 239 U.S. 195 (1915); 3 Am. Jur. 2d § 39, whereas the alien is considered to retain an allegiance to the country of his nationality which the country of residence is bound to respect. *Harisiades v. Shaughnessy*, 342 U.S. 580, 585-586 (1951). The alien's allegiance to the country of his nationality is not a matter of individual preference or personal loyalty as the district court suggests but a presumption of international law. *Harisiades v. Shaughnessy*, *supra*; *Roth*, *supra*. This presumption is recognized by the New York State Constitution Article XIII, Public Officers Law § 10 and Civil Service Law § 62 which require employees of the state or any of its civil divisions, except an employee in the labor class, to take an oath or file a statement pledging that he "will support the Constitution of the United States and the Constitution of the State of New York." The requirement of a similar oath for teachers was upheld in *Knight v. Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967, three-judge court), *aff'd* 390 U. S. 36 (1968).

The career civil service employee is an integral part of the executive branch of government. As in other public

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\* 5 C.F.R. §§ 338.101, 302.203(g) (1971); Public Works Appropriations Act of 1970 § 502, Pub. Law 91-144, 83 Stat. 336-7.

roles where citizenship is required,\* the civil servant participates directly in the formulation and execution of state and municipal policies. See *United Public Workers v. Mitchell*, 330 U.S. 75, 122 (1947) (DOUGLAS, J. dissenting in part). That such activity should be generally entrusted to citizens is appropriate. *Mow Sun Wong v. Hampton*, *supra* at p. 9;\*\* *People v. Crane*, 214 N.Y. *supra* at 163. The civil servant's involvement with state policy is no less direct or responsible than that of the attorney, *In re Griffiths*, 40 U.S. Law Week 2566 (Conn. Sup. Ct., Feb. 15, 1972), or the juror.

In considering the stable and efficient administration government in relation to the limitation on aliens in the career service, the district court found that the state interest involved was simply an economic one, the hiring and training of new employees to replace departing aliens. This demonstrates an unfortunate lack of perception of the basic interest of democratic government, federal, state and local, in having its business administered by its own citizens. Moreover, the economic theory adopted by the district court is not supported by fact. The civil servant has a variety of rights and obligations which continue throughout the career service period of twenty or twenty-five years.† If he leaves prior to completing the career

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\* E.g., U.S. Const., Art. 2 § 1 (the President must be a natural born citizen); Art. 1 § 2 (a Representative must be seven years a citizen, a Senator, nine years a citizen); N. Y. State Const. Art. 4, § 2 (Governor and Lieutenant Governor must be citizens); Art. 3, § 7 (members of the Legislature must be citizens); Art. 2, § 1 (voters must be citizens); N. Y. Public Officers Law § 3 (all public officers must be citizens); N. Y. Judiciary Law § 460 (attorneys must be citizens); Judiciary Law §§ 504(1), 531(3), 596(1), 609(1), 662(1), 684(1) (trial and grand jurors must be citizens).

\*\* Page references are to Memorandum and Order.

† E.g. N.Y. Const. Art. 5, § 6; Civil Service Law §§ 50, subd. 1 and 52 (competitive examinations required to determine merit and fitness for original appointment and promotions); § 61 (requiring the selection of one of every three applicants on eligible lists when appointments are made); § 65 (establishing a preference in available

period, the State and local governments do not necessarily suffer financially. Indeed, they may benefit financially through lower current payrolls and lower long-term retirement obligations.\* However, in exchange for tenure and other benefits granted to career employees, the State and local governments seek administrative continuity and thus the long-term employee. In establishing eligibility requirements for such positions, the Legislature could properly distinguish between the citizen who could be expected to remain available over the long-term and the alien who could be fairly assumed to retain a strong affiliation with the country of his nationality and who is subject to expulsion. 8 U.S.C. § 1251; *Carlson v. Landon*, 342 U.S. 524, 535 (1951).

That the State of New York has not foreclosed aliens from all public employment does not invalidate the instant classification. Plainly, State and local governments must have a sufficient number of employees to conduct their business, Civil Service Law § 53, subd. 2, and can reserve the right to appoint aliens on an individual basis to temporary, non-tenured positions, Civil Service Law §§ 41, 42. It is to be noted that if an alien is appointed to the competitive class, § 53, subd. 2 provides that he "shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship."

*(footnote continued from previous page)*

positions for candidates successful in examination as against provisional appointees); § 75 (requiring a hearing for removal or other penalty on charges of misconduct or incompetence); § 76 (establishing a right to administrative appeal following disciplinary proceedings); and §§ 80 and 81 (establishing seniority preference in the event of abolition or consolidation of positions and for reinstatement.) See also N.Y. Retirement Law establishing the New York State Employees Retirement System and N.Y.C. Administrative Code § B83-1.0 et seq. establishing the N.Y.C. Employees' Retirement System. Both systems provide for mandatory membership for competitive class employees.

\* The current State and N.Y.C. policies of "attrition" are illustrative.



2. The holding of the district court that § 53 could be sustained under the Equal Protection Clause only if it was supported by a compelling state interest was in error. The appropriate standard is one of "close judicial scrutiny" or "necessary relation to a legitimate state interest."

*Graham v. Richardson*, *supra* at 372, established that classifications based on alienage were to receive "close judicial scrutiny" under the Equal Protection Clause. *Graham* does not hold that "close judicial scrutiny" is synonymous with the "compelling state interest" test reserved for classifications which penalize the exercise of specific constitutional or fundamental rights. *Shapiro v. Thompson*, 394 U.S. 613, 634 (1969). There is no constitutional or fundamental right to public employment. *Bailey v. Richardson*, 182 F. 2d 46, 57 (D.C. Cir. 1950), *aff'd* 341 U.S. 918 (1950); *Taylor and Marshall v. Beckham*, 178 U.S. 534 (1900); *Ex Parte Sawyer*, 124 U.S. 200 (1888); *Butler v. Commonwealth of Pennsylvania*, 51 U.S. (10 How.) 402 (1890); *Crenshaw v. U.S.*, 134 U.S. 99 (1890). See also *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 895-899 (1960).

Unlike welfare where limitations on eligibility deprive the individual of the necessities of life, *Graham v. Richardson*, *supra* at 380, the instant case presents only a transitory limitation applicable to one class of public employment. The public employer has been traditionally afforded broad latitude in qualifying its employees, *United Public Workers v. Mitchell*, *supra*; *Kem v. United States*, 177 U.S. 290 (1900); *Bailey v. Richardson*, *supra*, even where its regulations have touched upon such fundamental freedoms as the employee's right to participate in the political process. *United Public Workers v. Mitchell*, *supra*. As stated there: "For the regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." 330 U.S. *supra* at 101.



Reference to the cases cited in *Graham* to support "close judicial scrutiny" do not identify that standard with the compelling state interest test. *Graham v. Richardson*, *supra* at 372 n. 5 and n. 6. At the outset, it is to be noted that the cases cited involve nationalities\* or race,† not alienage. See *In re Griffiths*, *supra*. None employs the phrase "compelling state interest" except *Oyama v. California*, *supra*, which invalidated a statute that discriminated against United States citizens on the basis of national origin. *Korematsu* and *Hirabayashi* sustained war measures against resident Japanese although subjecting them to "rigid scrutiny". *Korematsu v. United States*, *supra* at 216. *Bolling v. Sharpe*, *supra* at 499, 500, examined racial segregation in the District of Columbia "with particular care" rejecting it as not "reasonably related to any proper governmental objective." *McLaughlin and Loving* invalidated criminal statutes prohibiting cohabitation between Negroes and Whites and miscegenation respectively holding that racial classifications could be sustained only if shown to to "necessary" to the accomplishment of some permissible state objective independent of racial discrimination. *McLaughlin v. Florida*, *supra*, at 196; *Loving v. Virginia*, *supra*, at 11.

The recent federal decisions in *Jalil v. Hampton*, *supra*, and *Mow Sun Wong v. Hampton*, *supra*, have not applied the compelling state interest test to the exclusion of aliens from federal public employment. In *Jalil*, the court takes note of the district court opinion herein and states that "special justification" must be shown by the federal government as well as by the states. However, the court cites Circuit Judge Lumbard's concurrence on this point requiring a "reasonable relationship" between a citizen-

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\* *Oyama v. California*, 332 U.S. 663 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

† *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

ship and the "special demands of a particular position." In *Mow Sun Wong, supra*, at p. 9, the court specifically rejects the application of the compelling state interest test and adopts instead the traditional standard of reasonable relation to a permissible interest.

The holding in *Graham* under the Equal Protection Clause is supported by the Court's finding that the state's interest in limiting expenditures was an insufficient basis for denying aliens equal access to welfare benefits. This result is reached under the "close judicial scrutiny" standard without the necessity of determining whether or not the state interest advanced is "compelling." See e.g. *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), holding that California's interest in the fish swimming in its coastal waters was insufficient to justify excluding Japanese and a few other racial minorities without invoking the compelling state interest test. At a minimum, the standard herein cannot be more stringent than that applied to the racial classifications in *McLaughlin* and *Loving* requiring "necessary" relation to a legitimate state interest.

3. **Section 53 does not conflict with a comprehensive federal plan for the immigration and naturalization of aliens. Neither the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 et seq., nor 42 U.S.C. § 1981 pre-empt the field of state and local employment of aliens.**

The provisions of the Immigration and Nationality Act relating to the employment of aliens are few and relate solely to the work the alien will perform upon entry to the United States.\* Unlike the multiple and continuing provisions regarding the pauperism of aliens cited in *Graham v. Richardson, supra* at 377-378, the provisions relating to alien employment do not establish a comprehensive plan.

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\* 8 U.S.C. §§ 1153(a)(3), (a)(6), 1182(a)(14).

Appellees' principal reliance must be placed in 8 U.S.C. § 1182(a)(14) which provides that alien may enter the United States to perform skilled or unskilled labor only if the Secretary of Labor certifies, at the time of the alien's visa application that there are not sufficient qualified workers performing such skilled or unskilled labor at the alien's destination and that his employment will not adversely affect the wages and working conditions of laborers already in the United States. The record herein establishes that the Appellees' positions in public employment were not the positions for which they were certified upon entrance to the United States. Further, it is uncontested that under the certification schedules in effect since at least 1965, Appellees would not have been admitted to the United States for the positions which they held with the City of New York or even for similar positions in the private sector. 29 C.F.R. Part 60, §§ 60.2(a)(1), (a)(2) and Schedule A at p. 152 and Schedule B at p. 154 (1971). Thus, the Immigration and Nationality Act and the regulations enacted pursuant thereto do not consider the working life of the alien in the United States, and therefore cannot be viewed as a comprehensive plan. Even assuming that the federal legislation and regulations look toward this area, there can be no "conflict" with § 53 which produces the identical result as the federal enactments in this case. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141-152 (1963); *Swift v. Wickham & Co., Inc.*, 230 F.Supp. 398, 406 (S.D.N.Y. 1964), aff'd 364 F. 2d 241 (2d Cir. 1966), cert. den. 385 U.S. 1036 (1967). Compare *Purdy & Fitzpatrick Co. v. State*, 79 Cal. Rptr. 77, 452 P. 2d 645, 651 (1969).

Reliance on 42 U.S.C. § 1981 as precluding the enforcement of § 53 is similarly inapposite. In *Takahashi v. Fish & Game Commission*, *supra* at 420, this Court held specifically that § 1981 did not preclude the state from enacting legislation applicable "exclusively to its alien inhabitants as a class" although the Court noted that the state's power

in this regard was "confined within narrow limits." The area of competitive class public employment is within those "narrow limits." Congress has not indicated any intention of dictating to the state whom it shall employ to execute its sovereign will. See *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (and opinion of *Douglas*, J. dissenting at 201, 205). The instant case is in marked contrast to *Hines v. Davidowitz*, 312 U.S. 52, 66-67 (1940) wherein Pennsylvania continued to enforce an extensive alien registration act following enactment of a similar federal statute applicable to all aliens residing in the United States.

4. **Section 53 does not erect an obstacle to aliens entering and abiding within the State of New York inconsistent with federal policy. Federal policy excludes aliens from public employment and is substantially identical with that of the State of New York.**

The limitations on the employment of aliens by the federal government are substantially identical with those embodied in § 53. See discussion, *infra* at pp. 12, 15. Accordingly, § 53 cannot be regarded as inconsistent with the federal policy regarding the entrance and abode of aliens.

The district court relied on *Traux v. Raich*, 239 U.S. 33 (1915) and *Graham v. Richardson*, *supra*, in holding that § 53 denied aliens the right to enter and abide in New York State. In *Traux*, the Court invalidated an Arizona statute which barred aliens from the "entire field of industry with the exception of enterprises that are relatively very small," 239 U.S. *supra* at 40, stating that the authority of the state did not extend to denying aliens "the ordinary means of earning a livelihood \* \* \* in the common occupations of the community. \* \* \*" 239 U.S. *supra* at 41. *Traux* was not concerned with the narrow and transitory limitation here in issue. Moreover, the Court did not hold that public employment was among the common occupations of the community. *Traux v. Raich*, *supra* at 40.

Indeed, in the cases decided with *Traux, Heim v. McCall*, 239 U.S. 175 (1915) and *Crane v. New York*, *supra*, the Court sustained limitations in aliens in public employment. In *Graham v. Richardson*, *supra* at 376-380, the Court was concerned with statutes which conditioned the necessities of life on citizenship or an alien's residence within the state for fifteen years, and not with the transitory limitation of, at best, arguable impact embodied in § 53. In *Graham*, the statutes and record supported the presumption that the alien could not reside in a state that so conditioned his ability to secure the necessities of life. The operation of § 53 does not support the same presumption herein.

### CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, March 24, 1972.

Respectfully submitted,

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State of New York  
*Attorney for Appellant*  
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## APPENDIX "A"

## Opinion and Order of Single District Judge.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

## MEMORANDUM

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PATRICK McL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
other persons similarly situated,

Plaintiffs,

*against*

JULE M. SUGARMAN, Administrator of New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

Defendants.

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71 CIVIL 992

## APPEARANCES

## For Plaintiffs:

Mobilization for Youth Legal Services, Inc.

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Lester Evens

Jeffrey G. Stark, Esqs.—of Counsel.

## For Defendants:

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Judith A. Gordon, Esq.—of Counsel.

## Appendix "A"

TENNEY, J.

Plaintiffs, individually and on behalf of all others similarly situated,<sup>1</sup> move this Court pursuant to 28 U.S.C. §§ 2281 and 2284 for an order convening a district court of three judges for the purpose of hearing and determining their application for a preliminary and permanent injunction to restrain defendants from continued enforcement of Section 53 of the New York Civil Service Law.<sup>2</sup>

Basing jurisdiction upon 28 U.S.C. §§ 1343(3), (4);<sup>3</sup> 42 U.S.C. § 1983, and 28 U.S.C. § 1331, plaintiffs seek to prevent defendants from depriving them of their rights as "person[s] . . . [entitled to] . . . due process of law . . . [and] equal protection of the laws" under the Fourteenth Amendment to the United States Constitution. Furthermore, plaintiffs contend that defendants' enforcement of Section 53 denies aliens the right to travel within the United States and encroaches upon the exclusive right of Congress to regulate immigration and naturalization.

In substance, plaintiffs claim that Section 53, which makes non-citizens ineligible for appointment to any position in the competitive class of civil service in New York City, discriminates against aliens residing in the City. More specifically, plaintiffs urge that their discharge from employment merely because they are not American citizens violated their rights to due process and equal protection under the Fourteenth Amendment since American citizens admittedly would not have been discharged.<sup>4</sup> *Yick Wo v. Hopkins*, 118 U. S. 356 (1886). It is further contended that enforcement of Section 53 infringes upon plaintiffs' right to travel among the states, as that right has been recognized in *United States v. Guest*, 383 U. S. 745 (1965) and *Truax v. Raich*, 239 U. S. 33 (1915). Finally, Section 53 is viewed by plaintiffs as encroaching upon the Congressional scheme for immigration and naturalization and hence must be declared void. *Truax v. Raich*,



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*supra*; *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P.2d 645, 653 (1969).

Defendants, on the other hand, cross-move for dismissal of the within action on the grounds this Court lacks subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 (3), (4). In addition, defendants contend that no substantial federal question requiring the convening of a three-judge court is presented by the within complaint.

We turn first to the motion to dismiss which, if granted, would dispose of the entire action. It appears unlikely that plaintiffs can meet the \$10,000 jurisdictional requirement of 28 U.S.C. § 1331, since the claims of the class members, being separate and distinct, may not be added together. *Snyder v. Harris*, 394 U. S. 332 (1969); *Cataleno v. Dep't of Hospitals*, 299 F. Supp. 116, 169 (S.D.N.Y. 1969). Furthermore, since the salary of the highest paid discharged member of the class is \$12,100 per annum and, as of the filing of the complaint, no member of the class had been off the payroll for more than three weeks, it is clear that no individual class member can presently meet the \$10,000 requirement. Moreover, if any class member is subsequently employed by a private employer he may never reach the requisite amount since his lost wages will never reach \$10,000. Finally, it is doubtful whether the future lost wages of which the individual class members may be deprived could be considered by this Court in computing the amount in controversy. *Cf. Eisen v. Eastman*, 421 F.2d 560, 566 (2d Cir. 1969); *Kochhar v. Auburn Univ.*, 304 F. Supp. 565, 567 (D.C. Ala. 1969).

I find defendants' reliance on *Tichon v. Harder*, Docket No. 35151 (2d Cir. Feb. 18, 1971), for dismissing the within action for lack of jurisdiction under 28 U.S.C. § 1343(3), misplaced. In that case, the plaintiff, a case worker in the Connecticut Department of Welfare, claimed she was denied procedural due process when the State fired her. The Court of Appeals, in affirming the dismissal of that



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action, held that § 1343(3) did not provide jurisdiction since only rights of personal liberty can be asserted under that section when one claims he has been denied procedural due process. "[T]he claim that appellant was denied procedural due process has no independent jurisdictional significance. . . ." *Tichon v. Harder, supra* at 1550. Clearly, the loss of employment is a property right vis-a-vis a right of personal liberty. However, plaintiffs contend not merely that they were denied procedural due process, but that they were also denied equal protection of the laws when the City discriminated against them. This, of course, involves a matter of personal liberty. See *Arington v. Massachusetts Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass. 1969). To hold otherwise would permit the City to dismiss an employee because of his race and yet offer him no opportunity for redress in the federal courts unless the matter in controversy satisfied the \$10,000 jurisdictional requirement of § 1331. Furthermore, such a holding would fly in the face of the very language of § 1343 (3) and that of the Fourteenth Amendment.

I conclude, therefore, that this Court does in fact have jurisdiction, under 28 U.S.C. § 1343(3), of the instant action. *Madison v. Wood*, 410 F.2d 564, 567 (6th Cir. 1969); *Penn v. Stumpf*, 308 F. Supp. 1238, 1244-46 (N.D. Cal. 1970); cf. *Davenport v. Berman*, 420 F.2d 294, 296 (2d Cir. 1969).

The next issue is whether the plaintiffs' complaint raises a substantial constitutional question necessitating the convening of a three-judge court. In a recent unanimous decision, *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), the California Supreme Court held that a state statute prohibiting the employment of aliens on public works was unconstitutional in that it: (1) offended the equal protection clause of the Fourteenth Amendment of the United States Constitution, and (2) interfered with the Congressional scheme for immigration

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and naturalization. There has also been a recent adoption of stricter standards of judicial review in cases dealing with "suspect classifications" or "fundamental interests". *Keyishian v. Bd. of Regents*, 385 U. S. 589 (1967); *Takabashi v. Fish & Game Comm.*, 334 U. S. 410, 420 (1948); *Hawkins v. Town of Shaw*, 39 U.S.L.W. 2431 (5th Cir. Feb. 9, 1971); see generally, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 (1969). Under this standard, the state must show the classification is necessary to a compelling state interest, rather than merely demonstrate a reasonable relation between the restriction and any possible valid state interest. Defendants argue, however, that the standard applies only to classifications which penalize the exercise of specific constitutional or fundamental rights and not with respect to public employment. Again, the defendants fail to perceive the gravamen of the instant action—denial of equal protection of the laws. "While there may be no constitutional right to public employment as such, there is a constitutional right to be free from unreasonably discriminatory practices with respect to such employment." *Whitner v. Davis*, 410 F.2d 24, 30 (9th Cir. 1969).

In light of the recent ruling of the California Supreme Court and the other noted developments in equal protection, it seems clear that a three-judge court should be convened to consider the substantial constitutional questions presented herein.

Accordingly, I will notify the Chief Judge of this Circuit that a three-judge court ought to be convened pursuant to Section 2284 of Title 28 of the United States Code.

So ordered.

Dated: New York, New York  
May 24, 1971.

CHARLES H. TENNEY  
U.S.D.J.

## Appendix "A"

71 CIVIL 992

Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas,  
and Sylvia Castro, individually and on behalf of all  
other persons similarly situated, Plaintiffs,

against

Jule M. Sugarman, Administrator of New York City Hu-  
man Resources Administration, and Harry I. Bronstein,  
City Director of Personnel and Chairman of the New  
York City Civil Service Commission, Defendants,

## FOOTNOTES

<sup>1</sup>Pg. 1. The determination as to whether the case is appropriately brought as a class action and, if so, the propriety of the definition of the class, is deferred for decision by the three-judge court.

<sup>2</sup> Pg. 2. N.Y. CIVIL SERVICE LAW § 53 (McKinney 1970)  
"Citizenship requirements.

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

2. . . ."

<sup>3</sup> Pg. 3. 28 U.S.C. § 1343, in pertinent part, provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1). . . .

(2). . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

<sup>4</sup> Pg. 3. The relevant language of the Fourteenth Amendment provides:

"[N]or [shall any State] deny to any *person* within its jurisdiction the equal protection of the laws." (Emphasis supplied.)

**APPENDIX "B"****Opinion of Three-Judge District Court.****UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

---

PATRICK McL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
And SYLVIA CASTRO, individually and on behalf of all  
persons similarly situated,

Plaintiffs,

against

JULE M. SUGARMAN, Administrator of New York City  
Human Resources Administration, and HARRY I. BRON-  
stein, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

Defendants.

---

*Three-Judge Court*

J. Edward Lumbard, C. J.  
Edward C. McLean, D. J.  
Charles H. Tenney, D. J.

**APPEARANCES:**

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Lester Evens

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Joel Lewittes, Esq., Assistant Attorney General—of Counsel.

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Judith A. Gordon, Esq.—of Counsel.

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**TENNEY, District Judge**

Plaintiffs are four of approximately twenty permanent resident aliens who, prior to December 28, 1970, were employed by private organizations which were merged into the New York City Human Resources Administration on that date. The City program was directed to the improvement of job skills among the unemployed and the underemployed. When the private organizations were merged into the City program, plaintiffs were hired by the City and assured their positions and salaries would be the same.<sup>1</sup> Shortly after their City employment commenced, however, plaintiffs were discharged pursuant to New York Civil Service Law § 53.1 (McKinney 1959), solely because of their alienage.<sup>2</sup>

On May 11, 1971, by order to show cause plaintiffs, alleging that Section 53 violated the Equal Protection Clause of the fourteenth amendment, the Supremacy Clause of the Constitution, and their right to travel among the states,<sup>3</sup> moved for the convening of a three-judge court and other relief. The single district judge found plain-

## Appendix "B"

tiffs raised a substantial constitutional question and recommended the convening of a three-judge court. Pursuant to the May 26, 1971 order of Chief Judge Henry J. Friendly, plaintiff's motions for declaratory judgment, injunctive relief and determination of class action<sup>4</sup> were submitted to this statutory three-judge court which heard argument on July 13, 1971.<sup>5</sup>

The issues raised by the instant action were recently the subjects of *Graham v. Richardson*, 403 U. S. 365 (1971), in which the Supreme Court held that state laws conditioning welfare assistance either on United States citizenship or, if the beneficiary was an alien, upon his having resided in the United States for a specified number of years were invalid. The rationale and holding of *Graham* control the outcome of plaintiffs' challenge to Section 53.

The fourteenth amendment provides "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws", and the Equal Protection Clause has long been held to apply to aliens as well as citizens. *E.g.*, *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). Of course, a state has traditionally been permitted to make classifications provided these have a reasonable basis. *E.g.*, *Dandridge v. Williams*, 397 U. S. 471, 485 (1970). Nevertheless, when a state's classification either impinges upon a fundamental right, *Shapiro v. Thompson*, 394 U. S. 618 (1969), or is based upon an inherently suspect classification such as race, nationality or alienage, that classification is subject to "close judicial scrutiny". *Graham, supra* at 372. Inasmuch as defendants have failed to demonstrate a compelling interest which would justify the classification created by Section 53, the statute violates the Equal Protection Clause of the fourteenth amendment.

The City and State attempt to justify their refusal to allow aliens the opportunity to compete for employment in the competitive class of civil service (hereinafter referred to as "CCCS") on two grounds: (1) a government

## Appendix "B"

is entitled to conduct its affairs through the agency of persons with undivided loyalty, and (2) Section 53 is properly related to efficient and stable government administration.

Since defendants neither elaborate on their loyalty argument nor contend that aliens, as persons with dual allegiance, are security risks,<sup>6</sup> it would appear that this justification is an application of the special public interest doctrine which is a phrase to describe the state's restricting the distribution of its limited resources to its own citizens. "*Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948), however, cast doubt on the continuing validity of the special public interest doctrine in all contexts." *Graham*, *supra* at 374 (emphasis supplied); accord, *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P.2d 645, 657-58 (1969).

The Court in *Graham*, *supra* at 374, concluded that an alien's constitutional right to equal protection could not be made to depend upon the concept that government benefits were a privilege, not a right, which is the basis of the special public interest doctrine, see *People v. Crane*, 214 N.Y. 154, 164, 108 N.E. 427, 430, *aff'd*, 239 U. S. 195 (1915), especially since resident aliens are subject to the same obligations as citizens, such as taxes and military service. Accord, *Purdy & Fitzpatrick*, 456 P.2d at 656. The arbitrariness and unfairness of denying aliens the employment benefits of the City and State are even more apparent when one realizes that an alien who may have resided in New York for a number of years and contributed to its growth and development is denied the opportunity to compete for employment in CCCS whereas any *United States citizen* (vis-a-vis an American citizen residing in New York) who may not be or have ever been a New York resident and, accordingly, may not have made any contribution to it, is eligible for such employment. *Purdy & Fitzpatrick*, 456 P.2d at 656. Therefore, without a showing by defendants



*Appendix "B"*

that the "loyalty" requirement bears a relationship to a compelling interest of the City and State, it violates the Equal Protection Clause.

The second justification for Section 53—that it is properly related to efficient and stable government administration—also does not withstand "close judicial scrutiny". Defendants contend that an alien is less likely to remain in the United States during his employment life than is an American citizen and, thus, if an alien is hired into a "career" position of CCCS, a decision to return to his homeland will adversely affect the efficiency and stability of the administration of the governments of the City and State. However, this argument of defendants is inapposite since it is primarily concerned with whether or not a "career" employee is likely to remain in the United States rather than in New York. There is no offer of proof on this issue and defendants would be hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years, as have plaintiffs, and whose family also resides here, would be a poorer risk for a career position in *New York* (vis-a-vis in the United States) than an American citizen who, prior to his employment with the City or State, had been residing in another state. Judicial notice can be taken of the mobility of today's society and of the numerous persons who flock to places such as New York City and Washington, D.C. for relatively short stays in order to gain valuable experience through government employment or for the adventure and glamour those cities offer. Inasmuch as the defendants do not attempt to distinguish among United States citizens in their hiring of "career" employees, their argument for discriminating against aliens is not valid. Assuming, *arguendo*, that it were valid, it still cannot withstand the requirements of the fourteenth amendment as enunciated in *Graham*.



## Appendix "B"

This efficiency argument of the City and State is an economic one—if the defendants hire aliens into career positions and the aliens eventually quit and return to their homelands, new employees will have to be hired and trained to replace the experienced and therefore more efficient departed aliens; all of which costs defendants money. Again, however, as pointed out above in response to the "loyalty" argument, aliens pay taxes and often contribute to the welfare of the city and state in which they reside—certainly more than do American citizens residing in another state or section of the country and, therefore, discriminating against aliens on economic grounds is particularly inappropriate. Furthermore, a state may not attempt to limit expenditures by creating invidious distinctions among persons within the state without violating the Equal Protection Clause, and the Supreme Court in *Graham, supra* at 375, so held: "[A] concern for fiscal integrity is no . . . justification for the questioned classification in these cases. . . ."

Although *Graham* did not explicitly overrule two early Supreme Court cases, *Crane v. New York*, 239 U. S. 195 (1915); *Heim v. McCall*, 239 U. S. 175 (1915), which are admittedly factually similar to the instant action and which upheld a New York statute prohibiting employment of aliens on public works, they are no longer controlling. In *Purdy & Fitzpatrick, supra*, the California Supreme Court was faced with a challenge to a statute virtually identical to that in *Crane* and *Heim* and unanimously held that the statute was violative of the Equal Protection Clause. In doing so, the court concluded that the original basis for the result in *Heim* was invalid and that recent developments in the law of equal protection had removed whatever validity *Heim* had at the time of its decision and that *Takahashi* warranted the rejection of such cases as *Heim* and *Crane*. If there were any doubt about the legitimacy of that California decision, it should have been put

*Appendix "B"*

to rest by *Graham* which also strongly criticized the rationale of *Crane* and *Heim* and rejected it as a basis for denying welfare benefits to aliens. Taken together, *Graham* and *Takahashi* sufficiently weaken the value of *Crane* and *Heim* as precedents for upholding state laws denying aliens government employment and, therefore, those cases can be viewed as implicitly overruled and no longer law. That *Graham* did not explicitly overrule *Crane* and *Heim* can be viewed only as reflecting an intention to defer such action until faced with a proper factual setting in which states were given an opportunity to present their justifications for denying aliens employment opportunities. We are now faced with such a case and the City and State have failed to offer sufficient justification for Section 53; accordingly, we have adopted the reasoning of *Graham* and hold Section 53 violative of the Equal Protection Clause.

In the opinion of this Court, Section 53 is also unconstitutional because it conflicts with the Supremacy Clause of the Constitution. Specifically, Congress has enacted a comprehensive plan for the regulation of immigration and naturalization and has granted to aliens through 42 U.S.C. §1981 (1970) 'the full and equal benefits of all laws in this country. "Moreover . . . [the Supreme] Court has made it clear that . . . aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminating laws.' *Takahashi*, 334 U. S. at 420." *Graham*, *supra* at 377-78. Relying on these premises, the court in *Graham* concluded that state laws restricting the eligibility of aliens for welfare assistance solely because of their alienage conflicted with the federal policy and hence were unconstitutional. Section 53 is invalid for these same reasons.

## Appendix "B"

In *Truax v. Raich*, 239 U. S. 33, 42 (1915), the court reasoned:

"The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." *Accord, Graham, supra* at 14.

In quoting the above language from *Truax* with approval, the court in *Graham, supra* at 15, held:

"State alien residency requirements, that either deny welfare benefits to noncitizens or condition them on longtime residency, equate with the assertion of a right, inconsistent with federal policy, to deny entrance and abode. Since such laws encroach upon exclusive federal power, they are constitutionally impermissible."

Just as the laws in *Truax*<sup>a</sup> and *Graham* equated with a right in the states to admit and exclude aliens, an exclusively federal right, Section 53 encroaches upon this exclusively federal power and denies aliens the "full and equal benefit of all laws for the security of persons and property". Since the federal government has preempted the field in the case of denying aliens welfare assistance,

*Appendix "B"*

it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned upon long-term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Section 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens.

In sum, Section 53 is tantamount to an assertion by New York City and the State of New York of the right to deny aliens entrance and abode—a right that is exclusively federal. Furthermore, Section 53 is clearly violative of 42 U.S.C. § 1981 (1970) in that it denies aliens the equal benefits of the laws of New York as are enjoyed by white citizens. In light of the language of *Graham*, this Court is constrained to find that Section 53 also conflicts with the Supremacy Clause and is unconstitutional, and enforcement of it will be enjoined.

Accordingly, plaintiff's motion for class action, preliminary and permanent injunctive and declaratory relief is hereby granted.

Settle order on notice.

Dated: New York, New York  
November 9, 1971.

J. EDWARD LUMBARD  
C.J.

EDWARD C. McLEAN  
D.J.

CHARLES H. TENNEY

*Appendix "B"***LUMBARD, Circuit Judge (concurring)**

I concur in Judge Tenney's opinion. The city and state have offered no justification for New York Civil Service Law § 53 that can stand in light of the Supreme Court's opinion in *Graham v. Richardson*, 403 U. S. 365 (1971). I think that the "special public interest" doctrine and the Court's earlier decisions in *Heim v. McCall*, 239 U. S. 175 (1915), and *Crane v. New York*, 239 U. S. 195 (1915), can no longer be viewed as controlling in light of the Court's language in *Graham v. Richardson*, *supra*, and *Takahashi v. Fish & Game Commission*, 334 U. S. 410 (1948). Not only does Section 53 run afoul of the Equal Protection Clause, but it conflicts both with 42 U.S.C. § 1981 (1970) and the federal government's general power over the immigration and naturalization of aliens. *See Graham v. Richardson*, *supra*, at 376-80.

While the question we decide today is an important one, it is equally important to recognize those areas into which the Court's holding does not extend. Nothing in our decision should be construed to mean that a state may not lawfully maintain a citizenship requirement for those positions where citizenship bears some rational relationship to the special demands of the particular position. There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and the city, and their citizens, may properly require the officeholder to be a United States citizen.

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*Appendix "B"*

71 CIVIL 992

Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas,  
and Sulvia Castro, individually and on behalf of all  
persons similarly situated, Plaintiffs,

against

Jule M. Sugarman, Administrator of New York City Human Resources Administration and Harry I. Bronstein, City Director of Personnel and Chairman of the New York City Civil Service Commission, Defendants.

## FOOTNOTES

<sup>1</sup> Pg. 2 Plaintiffs Jorge and Vargas were employed as clerk-typists; plaintiff Castro as a senior human resources technician; and plaintiff Dougall as an administrative assistant in the staff development unit.

<sup>2</sup> Pg. 2. Section 53.1 provides:

"Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

<sup>3</sup> Pg. 2. We have not found it necessary to reach the question whether aliens have a constitutional right to travel among the states.

<sup>4</sup> Pg. 2. Plaintiffs' motion for class action determination is granted; the class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of Civil Service.

<sup>5</sup> Pg. 2. Jurisdiction of this court is based upon 28 U.S.C. § 1343 (3) and (4). Reference is also made to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 2201, 2281 and 2284.

<sup>6</sup> Pg. 4. Defendants would be on particularly shaky ground if they were to argue that aliens were ineligible for employment in CCCS because they are security risks. In fact, defendant argued in support of Section 53's validity that plaintiffs, as aliens, were eligible for other government employment in the generally higher paying and more responsible appointive positions, as well as in the labor

## Appendix "B"

class. E.g., N.Y. Civil Service Law §§ 35, 41, 42 and 43 (McKinney 1959). Furthermore, Section 53.2 specifically allows the state to temporarily waive the citizenship requirements during a shortage of qualified citizens. In light of the availability of more responsible positions to aliens and that defendants may waive the citizenship requirements when it suits their needs, it would be incongruous to contend that aliens were denied employment in CCCS because their dual allegiance constituted a security risk to the City and State.

<sup>7</sup> Pg. 8. 42 U.S.C. § 1981 (1970) provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to . . . the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

This provision was previously 8 U.S.C. § 41, a section of that title of the United States Code dealing with Aliens and Nationality. It is also clear that 8 U.S.C. § 41 extended to aliens as well as citizens. *Takahashi*, 334 U. S. at 419.

<sup>8</sup> Pg. 10. There is language in *Truax*, 239 U. S. at 41, which implies that states may deny some employment opportunities to aliens without invading this exclusive federal authority as long as it does not foreclose nearly the entire field of industry. Defendants then argue that since they employ only about 5 per cent of the state workforce, Section 53 is valid. However, the facts of *Sailer v. Leser*, the companion case to *Graham*, clearly demonstrate that a state law need have very little actual impact on aliens before it constitutes an impermissible encroachment upon the exclusive federal power to admit and exclude aliens. In *Sailer*, the class of persons actually affected by the denial of welfare assistance represented only 65-70 cases annually. Certainly Section 53 imposes at least as great an obstacle to the entrance and abode of aliens as did the statute in *Sailer*, since there are apparently in excess of 500,000 aliens residing in New York. *Plaintiffs' Brief* at 7.



**APPENDIX "C"****Order of Three-Judge District Court.****UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

---

**PATRICK McL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS  
and SYLVIA CASTRO, individually and on behalf of all  
persons similarly situated,**

**Plaintiffs,****against**

**JULE M. SUGARMAN, Administrator of New York City  
Human Resources Administration, and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,**

**Defendants.**

---

***Three-Judge Court*****J. Edward Lumbard, C.J.****Edward C. McLean, D.J.****Charles H. Tenney, D.J.**

**This cause having come to be heard before a statutory  
three-judge court convened pursuant to 28 U.S.C. § 2281  
by order of the Honorable Henry J. Friendly, Chief Judge  
of the Second Circuit Court of Appeals, dated May 26,  
1971, and consisting of the Honorable J. Edward Lumbard,  
Circuit Judge, the Honorable Edward C. McLean, District  
Judge, and the Honorable Charles H. Tenney, District  
Judge, on plaintiffs' motion for an order determining that  
this action may proceed as a class action declaring N.Y.  
Civil Service Law § 53 unconstitutional and enjoining en-**



*Appendix "C"*

forcement thereof; and the three-judge court having considered the pleadings, affidavits and briefs submitted on behalf of the parties, having heard oral argument on July 13, 1971, and having rendered its decision in an opinion dated November 9, 1971, it is

ORDERED that plaintiffs Dougall, Jorge and Vargas are representatives of a class consisting of all permanent resident aliens who, but for the enforcement of N.Y. Civil Service Law § 53, would otherwise be eligible to compete for employment in the competitive class of civil service; and it is further

ORDERED that N.Y. Civil Service Law § 53 is declared unconstitutional; and it is further

ORDERED that defendants, their successors in office, agents and employees and all other persons in active concert with them are permanently enjoined from enforcing N.Y. Civil Service Law § 53; and it is further

ORDERED that this three-judge court is hereby dissolved and all claims for relief are remanded to the single district judge to whom the motion for the convening of a three-judge court was originally presented, the Honorable Charles H. Tenney; and it is further

ORDERED that execution of this order is stayed pending a timely appeal by the defendants to the United States Supreme Court.

Dated: New York, New York  
December 23, 1971.

J. EDWARD LUMBARD, C.J.  
EDWARD C. McLEAN, D.J.  
CHARLES H. TENNEY, D.J.

**APPENDIX "D"**

**Notice of Appeal of State of New York.**

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF NEW YORK**

**71 CIV 992**

---

**PATRICK McL. DOUGALL, ESPERANZA JORGE, TERESA VARGAS  
and SYLVIA CASTRO, individually and on behalf of all  
persons similarly situated,**

**Plaintiffs,**

**against**

**JULE M. SUGARMAN, Administrator of New York City  
Human Resources Administration, and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,**

**Defendants.**

---

**NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES**

Notice is hereby given to the plaintiffs above-named that Louis J. Lefkowitz, Attorney General of the State of New York, hereby appeals to the Supreme Court of the United States from the final order granting plaintiffs' motion for class action, preliminary and permanent injunctive and declaratory relief entered in this action on December 23, 1971.

*Appendix "D"*

The appeal is taken pursuant to 28 U.S.C. § 1253.

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York

By

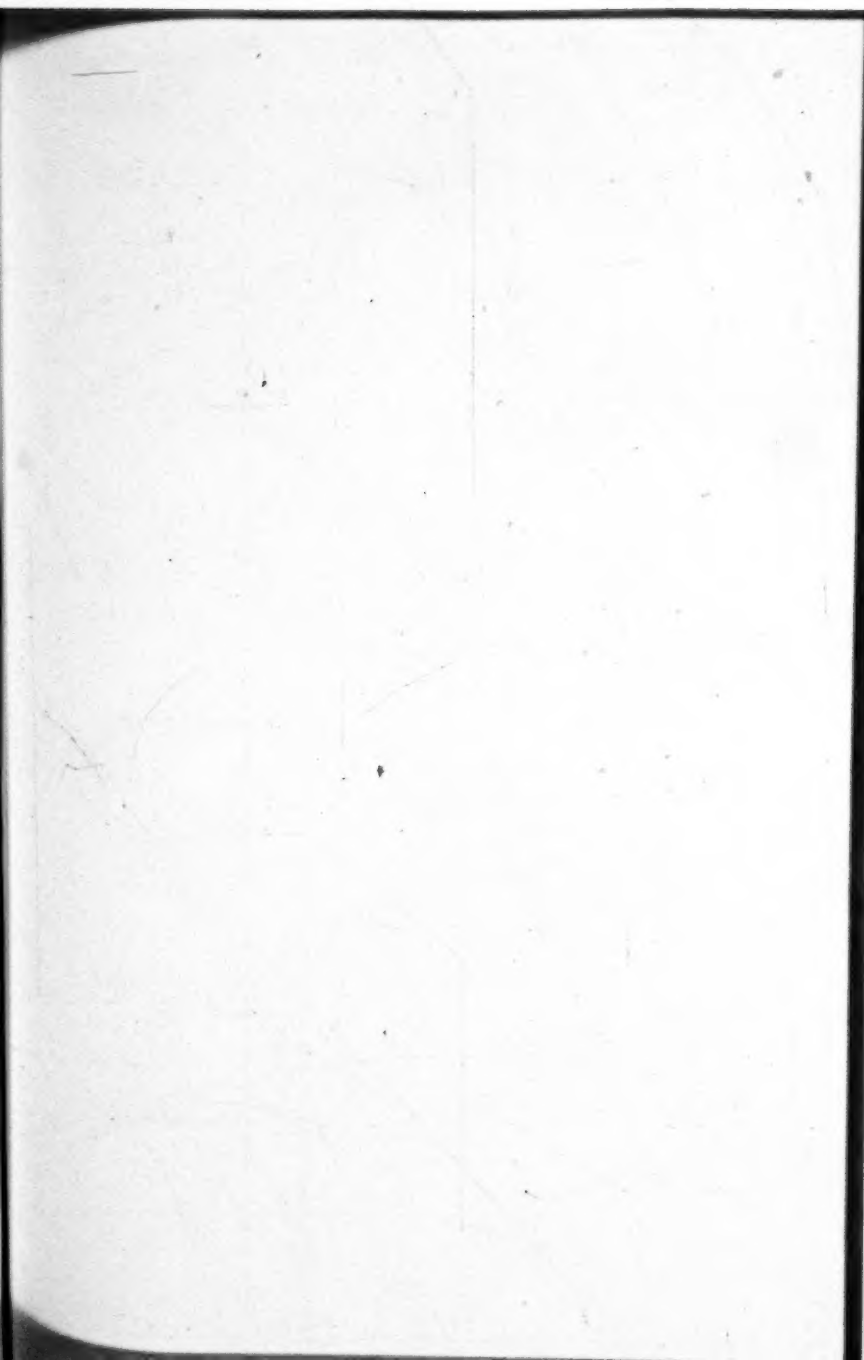
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Att: Judith A. Gordon, Esq.  
Assistant Corporation Counsel

Filed January 19, 1972



(51215)

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

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No. 71-1222

---

JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK MC. L. DOUGALL, ESPERANZE JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

---

**BRIEF IN OPPOSITION TO MOTION TO AFFIRM**

---

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

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No. 71-1222

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JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK MC. L. DOUGALL, ESPERANZE JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK.

---

**BRIEF IN OPPOSITION TO MOTION TO AFFIRM**

This brief is submitted in opposition to Appellees' mo-  
tion to affirm the judgment below pursuant to Rule 16(4)  
of the Rules of the Supreme Court of the United States.

## ARGUMENT

Appellees' contention that prior decisions of this Court dispose of the instant appeal is incorrect. This Court has never adjudicated the State's right to conduct its internal operations through the agency of citizens rather than aliens.

*Graham v. Richardson* and *Sailer v. Leger*, 403 U.S. 365 (1971) are "welfare cases", 403 U.S. *supra* at 366, where in the state statutes considered limited public assistance to citizens or long term alien residents "solely on the basis of a State's 'special public interest' in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits." 403 U.S. *supra* at 372. The Court specifically reserved consideration of state classifications between aliens and citizens "in other contexts", 403 U.S. *supra* at 374, and thus did not consider the sufficiency of state interests supporting classifications which are unrelated to the state's preservation of its fisc.

The case at bar concerns the right of a state to make citizenship a condition of employment in one class of the civil service,\* a matter of internal government operations related to the state's right to be served through the agency of persons of undivided allegiance and with a minimum risk of personnel turnover (Main brief, pp. 12-14). Oaths of allegiance by public employees to the federal and state governments have been repetitively sustained as a legitimate object of state legislation. E.g. *Cole v. Richardson*,

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\* Appellees repeat the allegation made in the district court that the classes of the civil service which do not limit employment to citizens "involve much higher levels of authority and policy making [than] the competitive class" to which N.Y. Civil Service Law applies (Motion to Affirm, p. 3). There is no basis in the record for this contention (Main brief, pp. 10 (footnote), 14).

40 U.S. Law Week 4381 (4-18-72) (dissents by *Douglas*, J., and *Marshall* and *Brennan*, JJ. pertain to portions of the Massachusetts oath there in issue which are not required by N.Y. Civil Service Law § 62); *Ohlson v. Phillips*, 397 U.S. 317 (1970); *Knight v. Board of Regents*, 390 U.S. 36 (1968). See also *Law Students Research Council v. Wadmond*, 401 U.S. 154, 161-162 and 189-190 (1971).

Further, the force of Appellant's argument that the alien presents an unacceptable risk for career employment because he is subject to expulsion from the United States and because of his continuing identification with his country of origin is not diminished by the fact that the State of New York and its political subdivisions may employ citizens who reside in neighboring states (Motion to Affirm, p. 5). Plainly, the state interests presented by the instant appeal cannot be identified with the economic preference condemned in *Graham v. Richardson*, *supra*. Accordingly, *Graham* cannot be utilized as the basis for summary affirmance of the district court opinion.

There is no evidence in the record to support the contention that N.Y. Civil Service Law § 53 encroaches upon the exclusive federal power to admit or exclude aliens from the territory of the United States (Motion to Affirm, p. 6). The state's authority to regulate its employees is not subject to such challenge in the absence of a federal statute consistent with Congress' delegated powers. Cf. *Maryland v. Wirtz*, 392 U.S. 183 (1968). Further, it is uncontested that had the Appellees sought to enter the United States to perform the type of work they did for the City of New York, they would not have been admitted (Main Brief, p. 18), and there has been no showing that the operation of § 53 prevents or deters the entry and abode of aliens in the State of New York. Compare *Truax*

v. *Raich*, 239 U.S. 33, 40-42 (1915);\* *Richardson v. Graham*, 403 U.S. *supra*, at 370, 379-80.

Appellees' claim of federal pre-emption is similarly without merit. The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* does not purport to dictate whom the state shall employ to conduct its affairs. To the contrary, Congressional enactment of legislation effectively limiting federal employment to citizens conclusively establishes its intent to leave this area to the discretion of the states (Main Brief, p. 12).

*Graham v. Richardson, supra*, cannot be read so expansively as to point the way, let alone mandate, the employment of aliens in the internal operations of government. The alien prior to naturalization has yet to establish "a knowledge and understanding of the fundamentals and of the principles and of the form of government, of the United States [and of the states]". 8 U.S.C. § 1423. That he is entitled to share in the public treasury in order to secure the necessities of life as are citizen taxpayers does not mean that he is entitled to share in running the government.

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\* Appellees cite *Truax v. Raich, supra* (Motion to Affirm, p. 6), but fail to point out that were the district sustained, *Truax* would be effectively overruled. *Truax* invalidated a limitation on alien employment in the "common occupations" of the private sector, 239 U.S. *supra* at 41. The case was decided with *Heim v. McCall*, 239 U.S. 175 (1915) and *Crane v. New York*, 239 U.S. 195 (1915), which sustained alien limitations on public employment. Accordingly, *Truax* must be read as excluding public employment from the "common occupations of the community." *Truax v. Raich, supra* (Main Brief, pp. 19-20).

## CONCLUSION

The motion to affirm the judgment of the district court should be denied and this Court should grant plenary consideration to this appeal.

Dated: New York, N. Y., June 7, 1972.

Respectfully submitted,

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AUG 31 1971

IN THE  
**Supreme Court of the United States** RODAK, JR., CL.

OCTOBER TERM, 1971

No. 71-1222

JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK Mc L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR ATTORNEY GENERAL  
OF THE STATE OF NEW YORK**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

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No. 71-1222

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JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK MC L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**BRIEF FOR ATTORNEY GENERAL  
OF THE STATE OF NEW YORK**

---

**Opinions Below**

The opinion of the single district judge ordering the convening of a three-judge district court (A. 38-43),\* dated May 24, 1971, is reported at 330 F. Supp. 265. The opinion of the three-judge court and the concurring opinion of

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\* References prefixed by the letter "A" refer to the Appendix filed with this Court.

Circuit Judge Lumbard (A. 81-92), dated November 9, 1971, are reported at 339 F. Supp. 906. There are no separate findings of fact and conclusions of law.

### **Jurisdiction**

The order of the district court (A. 93-94) was entered on December 23, 1971. The municipal appellants filed a notice of appeal (A. 95-96) on January 19, 1972. The Attorney General of the State of New York filed a notice of appeal (A. 97-98) on January 21, 1972. The jurisdictional statement was filed on March 24, 1972. This Court noted probable jurisdiction on June 12, 1972.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

### **Statute Involved**

New York Civil Service Law § 53 states:

#### *Citizenship requirements*

1. Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States.

2. Notwithstanding any of the provisions of this chapter or of any other law, whenever a department head or appointing authority deems that an acute shortage of employees exists in any particular class or classes of positions by reason of a lack of a sufficient number of qualified personnel available for recruitment, he may present evidence thereof to the state or municipal civil service commission having jurisdiction which, after due inquiry, may determine the existence of such shortage and waive the citizenship requirement for appointment to such class or classes of positions. The state commission or such

municipal commission, as the case may be, shall annually review each such waiver of the citizenship requirement, and shall revoke any such waiver whenever it finds that a shortage no longer exists. A non-citizen appointed pursuant to the provisions of this section shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship.

### **Questions Presented**

1. Whether, under any of the standards of review articulated by this Court, aliens are denied the equal protection of the laws by the operation of Civil Service Law § 53?
2. Whether the district court applied the correct standard under the Equal Protection Clause in requiring that New York Civil Service Law § 53 be supported by a compelling state interest?
3. Whether Civil Service Law § 53 conflicts with a comprehensive federal plan for the regulation of immigration and naturalization of aliens?
4. Whether Civil Service Law § 53 erects an obstacle to aliens entering and abiding within the State of New York inconsistent with federal policy?

### **Statement of the Case**

The named appellees are aliens residing in the State of New York. From December 28, 1970 until March 5, 1971, they were employed in the New York City Civil Service. They entered the city service when two privately sponsored job training programs in which they had been employed were merged with a similar city program administered by the New York City Human Resources Administration. Ap-



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pellees were appointed provisionally to competitive class titles utilized by that Administration.\* They performed duties ranging from administering the program (appellee Dougall) to semi-professional counselling (appellee Castro) to stenographic and clerical appellees Jorge and Vargas) (A. 31-34).

Shortly after their civil service employment commenced, a routine personnel investigation conducted by the New York City Department of Personnel disclosed the alien status of the named appellees and sixteen others who were similarly employed. Their provisional appointments were then revoked and their services terminated pursuant to the requirements of Civil Service Law § 53, subd. 1 (A. 32-33).\*\*

Appellees claimed below that to distinguish between citizens and aliens in appointments to the career civil service pursuant to § 53 violated their Fourteenth Amendment

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\* The N.Y.S. Civil Service Law describes four classes of positions within the classified civil service: competitive (§ 44), exempt (§ 41), non-competitive (§ 42) and labor- (§ 43). The competitive class is commonly referred to as the career service and includes all positions "for which it is practicable to determine the merit and fitness of applicants by competitive examination". Civil Service Law § 44; N.Y. Const. Art. 5, § 6. Civil Service Law § 65 subd. 1 authorizes provisional appointments to the competitive class without examination when appropriate eligible lists of examined candidates are not available to fill vacancies. Provisional appointments are of brief duration. Civil Service Law § 65, subds. 2, 3, and 4. In contrast to the candidate appointed following the competitive examination, a provisional appointee cannot acquire tenure, promotion eligibility or seniority preferences by reason of his provisional service. Civil Service Law §§ 52, 75 subd. 1, 80, 81. See *Matter of Koso v. Green*, 260 N.Y. 491 (1933); *Matter of Rohl v. Jeacock*, 259 App. Div. 208 (4th Dept.), *aff'd* 284 N.Y. 260 (1940); *Matter of Poss v. Kern*, 263 App. Div. 320 (1st Dept. 1942).

\*\* Appellee Castro was terminated for the additional reason that she lacked sufficient relevant experience to qualify for her civil service appointment (A. 49, 76 and Deft's Ex. "4" p. 1 [Orig. Rec.]).



rights, infringed their right to travel interstate and to enter and reside within New York State. They further alleged that the power to regulate the activities of aliens was vested exclusively in the federal government, and, alternatively, that the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, had pre-empted state regulation in this field (A. 8-10). The amended complaint sought the convening of a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284, a class action order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, a temporary restraining order pursuant to 28 U.S.C. § 2284 enjoining the enforcement of § 53, final declaratory and injunctive relief, and damages in the amount of \$10,000 for each appellee (A. 10-12).

By order to show cause the named appellees moved for a class action order, for the convening of a three-judge court, and for a temporary restraining order enjoining the municipal appellants from terminating their employment and that of other persons similarly situated (A. 12-15). The municipal appellants opposed the motion and moved to dismiss the action on the ground of lack of subject matter jurisdiction (A. 30). Both motions were submitted to District Judge Charles H. Tenney on May 4, 1971.

In his opinion and order dated May 24, 1971, the District Judge held that subject matter jurisdiction was conferred by 28 U.S.C. § 1343(3). Relying principally on *Purdy & Fitzpatrick Co. v. State*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), which declared a state statute prohibiting contractors from employing aliens on public works projects unconstitutional, Judge Tenney found that substantial questions under the Equal Protection Clause and the Congressional scheme for immigration and naturalization were presented and directed that a three-judge court be convened. He referred the request for a class action order to the three-judge court and refused to issue a temporary restraining order (A. 38-43).

The three-judge court designated by the order of the Chief Judge of the United States Court of Appeals for the Second Circuit consisted of Circuit Judge J. Edward Lumbard and District Judge Edward C. McLean in addition to Judge Tenney. The municipal appellants answered (A. 44-74) and moved for summary judgment (A. 74). Pursuant to 28 U.S.C. §§ 2281 and 2284(2), the Attorney General of the State of New York was advised on June 7, 1971 that an action seeking to enjoin the operation of § 53 upon the ground of unconstitutionality was pending before the three-judge court. The Attorney General thereupon appeared in defense of the constitutionality of statute. The case was heard before the three-judge court on July 13, 1971.

On November 9, 1971, the three-judge district court issued its opinion declaring § 53 unconstitutional and granting appellees preliminary and permanent injunctive relief (A. 81-92).<sup>\*</sup> A concurring opinion was issued by Circuit Judge Lumbard (A. 90). The order thereon was stayed pending appeal to this Court (A. 94).

The opinion of the three-judge court rests on the assumption "rationale and holding" of *Graham v. Richardson*, 403 U.S. 365 (1971) "control the outcome" of appellees' challenge to § 53 (A. 82).

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<sup>\*</sup> The court also granted appellees' request for a class action order defining the class as follows: "The class shall consist of all permanent resident aliens residing in New York State who, but for the enforcement of Section 53, would otherwise be eligible to compete for employment in the competitive class of civil service" (A. 91 n. 4). Under the terms of the district court order (A. 93-94), appellee Castro was excluded from the class. The court apparently reached this result because she was terminated for her lack of appropriate experience in addition to her alienage (See footnote at p. 4, *ante*). Accordingly, she was not a person who, but the enforcement of § 53, "would otherwise be eligible to compete for employment in the competitive class. . . ." This portion of the three-judge court order is not in issue.

The court first considered § 53 under the Equal Protection Clause. Citing *Graham v. Richardson*, *supra* at 372, for the principle that classifications based on alienage are subject to "close judicial scrutiny", and finding a complete identity between that standard and the compelling state interest test, the court reviewed two state interests urged in support of the statute: (1) the government's right to conduct its affairs through the agency of persons with undivided allegiance; and (2) the government's need to employ citizens rather than aliens in order to maintain the efficiency and stability of the career civil service (A. 83).

In reviewing the first interest, the court rejected appellant's argument that the alien's allegiance to the country of his nationality made him unsuitable for employment in the career civil service, apparently finding that only a showing that aliens were security risks could satisfy the compelling state interest test. Had appellants attempted to make this showing, the court goes on, they would have been "on particular shaky ground" because of the availability of other classes of public employment (Civil Service Law §§ 41, 42) and the waiver provisions of § 53 subd. 2 (A. 83-84, 91 n. 6).<sup>\*</sup> The court then concluded that the state interest in employing persons of undivided allegiance in the career service is merely a restatement of the "special public interest doctrine" rejected as insufficient by this Court in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948) and *Graham v. Richardson*, *supra* (A. 83). Under that doctrine, the state was entitled to prefer

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<sup>\*</sup> In this context the court stated that the classes of positions in which aliens may be employed at the discretion of the appointing authority (Civil Service Law §§ 41, 42) are "generally higher paying" and "more responsible" than competitive class positions (A. 91-92 n. 6). Neither the Attorney General nor the municipal appellants so argued below, and there is no evidence in the record to support this proposition.

citizens in distributing its resources on the theory that the citizens, as the members of the state, were the beneficial owners of the resources.

The court also treated the second interest in terms of the state's concern for conserving its resources. Characterizing appellants' argument as limited to the state's economic interest in training new employees to replace departing aliens, the court compared the risk to the career service from the permanent resident alien who has resided in the state "for a number of years" and "whose family resides here" with that from the citizen resident newly arrived in the state and found the citizen resident no better risk than the alien (A. 84-85).<sup>\*</sup> The court then assumed the comparison in appellants' favor but still found that the requirements of the Equal Protection Clause were not met, presumably on its view that *Graham v. Richardson* mandated the application of the compelling state interest test (A. 85).

Turning to consideration of the paramount federal power over the regulation of aliens, the court held that § 53 conflicted with the Supremacy Clause of the Constitution. In support of its position, the court cited the "comprehensive plan for the regulation of immigration and naturalization" enacted by Congress (referring to the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* and 42 U.S.C. § 1981) and the federal policy forbidding a state to deny entrance and abode to aliens lawfully admitted to the United States (A. 87-88). Without further discussion of the terms of the alleged comprehensive plan governing the public employment of aliens and what impact, if any, § 53 has on an alien's entry and abode

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<sup>\*</sup> The court does not limit its holding on § 53 to the constitutionality of the statute as applied to permanent resident aliens. Rather, the statute is declared unconstitutional on its face and its enforcement is enjoined without exception.

in the State of New York,\* the court simply assumed an identity between the employment of aliens in the career civil service and restrictions on their participation in public assistance programs (A. 88).

"Since the federal government has preempted the field in the case of denying aliens welfare assistance, it has done so in the instant one. Any alien who would be discouraged from residing in a state because it either denied or conditioned on long-term residency his right to welfare assistance would likewise be discouraged from residing in New York because of Section 53. Such an alien could logically conclude that his best or possibly his only opportunity for equal opportunity employment would be with the governments of the City and State, and to him Section 53 would constitute a serious obstacle to either his entrance and/or abode in New York. In fact, Section 53 could be viewed as reflective of a more pervasive state policy to discriminate against aliens and hence to have established additional artificial barriers to the entrance and abode of aliens."

In his concurring opinion, Circuit Judge Lumbard described the area to which the court's opinion did not extend as "those positions where citizenship bears some

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\*The court cited *Sailer v. Leger*, decided with *Graham v. Richardson*, for the proposition that "very little actual impact" is necessary before a state statute contravenes the exclusive federal power to admit and exclude aliens (A. 92 n. 8). The court did not take note of the stipulation in the *Sailer* record which states: "[T]he denial of general assistance to aliens otherwise eligible for such assistance causes undue hardship to them depriving them of the means to secure the necessities of life, including food, clothing and shelter" and that 'the citizenship bar to the receipt of General Assistance in Pennsylvania discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other States which will meet their needs.'" *Graham v. Richardson*, *supra* at 370.

rational relationship to the special demands of the particular position." He continued: "There are some positions in the civil service, as in elective office, where broad policy decisions are made as a matter of course, and in such positions the state and city, and their citizens, may properly require the officeholder to be a United States citizen" (A. 90).

Judge Lumbard's opinion is difficult to reconcile with that of the three-judge court. First, he appears to accept the traditional reasonable relation standard as applicable § 53. Second, he appears to accept appellants' argument that the alien's allegiance to the country of his nationality distinguishes him from the citizen with respect to career civil service and to reject the court's finding that § 53 merely reflects an economic preference in favor of citizens.

### Summary of Argument

The right of the State to conduct its affairs through the agency of citizens and not aliens rests on the fundamental principal that sovereign functions must be performed by members of the State. This principle is reflected in the laws of nations and, in particular, in the laws of the United States and the State of New York, which exclude aliens from elective office, political rights and occupations intimately related to the affairs of government including the career civil service. In contrast to citizens, the alien owes primary allegiance to the country of his nationality, and must honor the obligations that country places on its nationals abroad. In the country of his residence, he has special privileges not shared by citizens which include diplomatic intervention on his behalf by the country of his nationality. Conversely, the country of his residence may limit the length of his stay and place severe limitations on his freedom of movement.



In light of these considerations, the State may distinguish between citizens and aliens in selecting employees to administer its internal affairs consistently with the aliens' rights under the Equal Protection Clause. In enacting New York Civil Service Law § 53, the State of New York has made this distinction in the only manner consistent with the unique characteristics of the career civil service. Its legislation in this area cannot be equated with restrictions on aliens' participation in public assistance programs where the citizen and alien are identically situated and where the state has evidenced a concern for its fisc by employing a crude economic preference. *Graham v. Richardson*, 403 U.S. 365, 374-376 (1971).

In view of its application to public employees and its relationship to the integrity and efficiency of the career civil service, § 53 is properly reviewed under the traditional equal protection standard. However, if § 53 is characterized as a "suspect" classification in this context, only the "close judicial scrutiny" branch of the strict equal protection standard is appropriate, not the "compelling state interest test" reserved for classifications which infringe specific constitutional or fundamental rights.

Properly viewed, "close judicial scrutiny" requires the Court to determine whether the alleged "suspect" criterion employed in the classification (here, alienage) is the "necessary" means of achieving a valid state interest. Since the use of a suspect criterion does not in itself infringe a constitutional or fundamental right, there is no occasion to weigh the state interests to determine whether they are "compelling".

As applied to the case at bar, the Equal Protection Clause is satisfied by appellants' showing that the nature of public employment and the unique characteristics of the career civil service require that a potential employee be considered in terms of his alien status pursuant to a rule of general application like § 53. However, if the Court

considers the state interests as against those of the aliens affected, the state interests must be found more "compelling." The government's right to conduct its internal affairs through the agency of persons who do not owe their primary allegiance to a foreign power and who are not subject to special privileges and burdens which impair both their capacity to identify with the public interest and the efficiency of the career civil service outweighs the alien's interest in competing for one class of positions in public employment on the same terms as citizens.

In enacting § 53 the State of New York has used powers reserved to it under the Tenth Amendment to determine the qualifications of its own employees. The federal government has no role in this regard. Even if Congress were empowered to make such regulations for the states, it has not done so in either the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*, or in 42 U.S.C. § 1981. Both statutes have been held to permit state legislation with respect to aliens and neither evidences any Congressional intent to preclude the consideration of alien status by the public employer. Indeed, the only federal policy in this area is expressed in the federal statutes and regulations which distinguish between the citizens and aliens in appointments to the federal career service in the same manner as the State of New York under § 53.



## POINT I

New York Civil Service Law § 53 does not deny aliens the equal protection of the laws under any of the standards of review articulated by this Court. The identity of the career civil service with the internal affairs of government requires that the alien's primary allegiance to the country of his nationality and the special privileges and burdens of alien status be considered with respect to his suitability for appointment. The state interests in this regard can only be achieved through a rule of general application like § 53 and outweigh the alien's interest in competing for this class of positions on the same terms as citizens.

- A. The applicable standard of review under the Equal Protection Clause cannot be more stringent than that of "necessary" relation to a valid state interest.

The public employer has broad discretion to establish qualifications for its employees related to the integrity and efficiency of the operations of government. *United Public Workers v. Mitchell*, 330 U.S. 75, 101 (1947); *Keim v. United States*, 177 U.S. 290, 293 (1900). The exercise of this discretion has been sustained even when it touches upon such fundamental freedoms as the employee's right to openly support the political party and candidate of his choice. *United Public Workers v. Mitchell*, *supra*. As stated there (330 U.S. *supra* at 101): "For regulation of [public] employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service."

In terms of the Equal Protection Clause, the regulations affecting the qualifications of public employees must be assessed under the traditional "reasonable relation" standard. See *United Public Workers v. Mitchell*, *supra*. State regulation of professions and trades affected by the public

interest is reviewed under the same equal protection standard. *Law Students Research Council v. Wadmond*, 401 U.S. 154, 167 (1971); *Schware v. Board of Law Examiners of New Mexico*, 353 U.S. 232, 239 (1957); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 556 (1947). There is no occasion to depart from this standard in the case at bar.

In distinguishing between aliens and citizens in terms of their qualifications for public employment, § 53 reflects considerations bearing directly on the integrity and efficiency of the career civil service. Just as Congress was entitled to broad latitude in considering the risks occasioned the federal career service by the employment of persons who are actively identified with a political party or candidate, so the State of New York is entitled to the same latitude in considering the risks occasioned its career service by employing persons who owe primary allegiance to a foreign power and who are subject to special privileges and burdens not shared by citizens. See *United Public Workers v. Mitchell*, *supra* at 96-103. Indeed, citizenship requirements for the federal career service substantially identical with § 53 have been sustained under a "reasonable relation" test.\* *Mow Sun Wong v. Hampton*, 333 F. Supp.

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\* The United States Civil Service Commission provides by regulation as follows (5 C.F.R. § 338.101 (1972)):

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States;

(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. . . .

5 C.F.R. § 338.101(b)(1) and (b)(2) (1972) authorize the employment of aliens in the career service when citizens are not available and in other rare circumstances. 5 C.F.R. Part 213 provides for an "excepted service" similar to the exempt and non-competitive classes under New York Civil Service Law §§ 41, 42. The federal legislation, orders and regulations are set forth in pertinent part at Exhibit "1" hereof.

527, 532 (N.D. Cal. 1971), app. pending 9th Cir. No. 70-2730, as have citizenship requirements for the practice of law. *In Re Griffiths*, 40 U.S. Law Week 2566 (Conn. Sup. Ct. Feb. 15, 1972), prob. juris. noted — U.S. — (1972), 40 U.S. Law Week 3576 (June 7, 1972 Doc. No. 71-1336). See also *Jalil v. Hampton*, — F 2d — Slip Op. 11 (D.C. Cir. March 8, 1972 Doc. No. 24,640), cert. appl'd for Doc. No. 71-1574, citing Circuit Judge Lumbard's concurrence herein as stating the appropriate standard for review of the federal career service regulations.

State legislation considering aliens in the context of their qualifications for public employment cannot be identified with "suspect" classifications applied selectively to certain races or nationalities or with restrictions on aliens' participation in public assistance programs requiring review under a strict equal protection standard. Cf. *Graham v. Richardson*, 403 U.S. 365, 371-372 (1971).

"The clear and central purpose of the Fourteenth Amendment was to eliminate all official sources of invidious racial discrimination in the States," and, accordingly such classifications have been subjected to a strict equal protection standard. *Shapiro v. Thompson*, 394 U.S. 618, 758-759 (1969) (opinion of HARLAN, J. dissenting).<sup>\*</sup> Similarly, classifications applied selectively on the basis of nationality and lineage have historically reflected racial distinctions appropriate to a strict standard of review.<sup>\*\*</sup>

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<sup>\*</sup> E.g. *McLaughlin v. Florida*, 379 U.S. 184, 191-192 (1964) (stating, in the context of criminal prohibition against Negro/white cohabitation, that race was "constitutionally" . . . "irrelevant"); *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (requiring "very heavy burden of justification" in reviewing a prohibition against interracial marriage); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (scrutinizing racial segregation in District of Columbia public schools with "particular care" and terming racial classifications "constitutionally suspect").

<sup>\*\*</sup> E.g. *Oyama v. California*, 332 U.S. 633, 644-646 (1948) (applying the compelling state interest test to state law which re-

In contrast, statutes treating aliens as a generic class have been reviewed under the traditional equal protection standard.\* Compare *Sei Fujii v. State*, 242 P. 2d 617, 625-630 (Cal. Sup. Ct. 1952) (applying "rigid scrutiny" to alien land law which prohibited aliens ineligible for citizenship, i.e., Japanese and a few other Mongolian nationalities, from owning land after finding that the statute discriminated on the grounds of race and nationality) with *Terrace v. Thompson*, 263 U.S. 197, 218-221 (1923) (applying reasonable relation test to alien land law which applied to all non-declarant aliens). Even when classifications have affected aliens in terms of nationality or race, this Court has not applied a strict equal protection standard. Thus in *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886), administrative action which excluded Chinese from engaging in the laundry trade was invalidated on the ground that public officials had provided "no reason" for their action, and in

(footnote continued from preceding page)

quired stronger evidentiary showing to avoid escheat from citizens born of aliens ineligible for citizenship, i.e. Japanese and a few other Mongolian nationalities, than from descendants of citizens or other alien nationalities); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying "most rigid scrutiny" to war measures against alien Japanese and citizens of Japanese ancestry); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (stating in the context of war measures against alien Japanese and citizens of Japanese ancestry that distinctions between citizens on the basis of ancestry or race are "odious to a free people" and "irrelevant" in most circumstances).

\* It appears that the degree of judicial scrutiny afforded generic classifications of aliens under the "special public interest" doctrine was even less stringent than the traditional equal protection standard. E.g. *Heim v. McCall*, 239 U.S. 175 (1915) and *Crane v. New York*, 239 U.S. 195 (1915) (exclusion of aliens from public works projects presents only considerations of policy with which the judiciary has no concern); *Patson v. Pennsylvania*, 232 U.S. 138, 144 (1914) (exclusion of aliens from hunting wild game is a policy judgment based on "local experience" which courts should be "very slow" to reject); *Clarke v. Deckebach*, 274 U.S. 392, 396 (1927) (exclusion of aliens from operating billiard and pool rooms is question for legislature to determine based on nature of the occupation and local conditions).

*Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948) a state statute prohibiting the issuance of commercial licenses to aliens ineligible for citizenship, i.e., Japanese and a few other Mongolian nationalities, was invalidated on the ground that the state's claim of ownership to the fish swimming in its offshore waters, and thus its "interest" in preserving the supply for its citizens, was "inadequate" to justify the exclusion of aliens.\* Since Civil Service § 53 establishes a generic classification reflecting the special requirements of public employment in the career civil service, the strict equal protection standard reserved for classifications selective as to race or nationality is not appropriate.

Similarly, the special concern which this Court has shown in the context of public assistance programs is not appropriate to § 53. See *Graham v. Richardson*, *supra* at 379-380, *Shapiro v. Thompson*, *supra* at 627, *Goldberg v. Kelly*, 397 U.S. 254, 265-266 (1970). In the absence of a job in the public sector, neither the alien nor the citizen is deprived of the necessities of life while without welfare benefits neither, if indigent, can survive.\*\* The state interest in its welfare program is purely a financial one. Both in terms of their contributions as taxpayers and their needs as recipients, the citizen and the alien stand on identical terms with respect to that interest. Thus, to invoke alien status as a criterion for eligibility for public

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\* Significantly, the result in *Graham v. Richardson*, *supra*, can be reached under the same standard used in *Takahashi*: the state interest in the preservation of its fisc is "inadequate" to justify the exclusion of aliens from welfare benefits to which they have contributed on the same basis as citizen tax payers.

\*\* The difference in significance between the welfare recipient's interest in public assistance and the public employee's interest in his job is reflected in the fact that the recipient is constitutionally entitled to a pre-termination hearing, *Goldberg v. Kelly*, *supra*, while the public employee is not. *Board of Regents v. Roth*, — U.S. — (1972), 40 U.S. Law Week 5079 (June 29, 1972).

assistance is to establish a crude economic preference unsupported by any relevant distinction between the citizen and the alien. *Graham v. Richardson*, *supra* at 374-376. In contrast, the state interest in the integrity and efficiency of the career civil service requires that alien status be recognized in qualifying employees. Thus, the fact that alien status is a "suspect" criterion with respect to restrictions on aliens' participation in a public assistance program where he is identical with the citizen in all material respects does not make it "suspect" in the context of public employment where state interests involved require that the alien and the citizen be considered light of their differences. See *McDonald v. Board of Election*, 394 U.S. 802, 808-809 (1968) (applying the traditional "reasonable relation" standard in reviewing alleged infringement of fundamental right to vote).

Even accepting *arguendo* that § 53 establishes a "suspect" classification requiring "close judicial scrutiny", that branch of the strict equal protection standard must be distinguished from the "compelling state interest test". Only the former may be applied to the case at bar. See *Graham v. Richardson*, *supra* at 371-372, 375-376.

"Close judicial scrutiny" is afforded to legislation which defines the class of persons to whom it applies in terms of a "suspect" criterion generally considered irrelevant to a valid state interest. *Graham v. Richardson*, *supra* at 371-372 and cases cited at n. 5 and n. 6. Under this branch of the strict equal protection standard, the Court may not require appellants to meet a higher burden of proof than that required in defense of racial classifications, i.e., "necessary" relation to a valid state interest. *Loving v. Virginia*, *supra* at 11; *McLaughlin v. Florida*, *supra* at 196.\*

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\* In *McLaughlin*, the Court invalidated a cohabitation statute which applied a more onerous evidentiary presumption to Negro/



In contrast, the "compelling state interest" test is applied to legislation which infringes a specific constitutional or fundamental right of the members of the class. Under this test, the state interests must be weighed against the rights infringed by the statute.\* There is no constitutional or fundamental right to public employment, and accordingly the "compelling state interest" test has no application to the case at bar. *Board of Regents v. Roth*,

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white interracial couples. It was assumed that the purpose of the statute was to deter promiscuity and that such a purpose was valid. Upon finding no evidence to support greater public anxiety about promiscuity among interracial couples than others, the Court then concluded that the classification was not "necessary . . . to the accomplishment of a permissible state policy" noting that a statute "neutral as to race" would be just as effective in achieving the state interest. 379 U.S. *supra* at 196. Similarly in *Loving*, the Court invalidated a miscegenation statute prohibiting marriage between whites and Negroes stating that a racial classification could be upheld only if shown to be "necessary to the accomplishment of some permissible state objective, independent of racial discrimination." 388 U.S. *supra* at 11. The Court then found that the only objective of the statute was the maintenance of white supremacy, an "impermissible" state interest. 388 U.S. *supra* at 11. Statements in *McLaughlin*, *supra* at 192 and *Loving*, *supra* at 11 referring to "overriding statutory purpose" do not intend the application of a balancing test to determining whether the objective sought is "compelling" but refer rather to the established principle that racial classifications cannot be sustained as ends in themselves but only as the means of achieving a state objective "independent" of race. *Loving v. Virginia* *supra* at 10-11 and cases cited.

\* E.g. *Dunn v. Blumstein*, 405 U.S. 330, 336-342 (1972) (right to travel and right to vote infringed by one year (state) and three month (county) durational residence requirement to register to vote); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968) (right of political association and right to vote infringed by restrictions on party's obtaining position on ballot); *Shapiro v. Thompson*, *supra* at 634, 638 (1968) (right to travel infringed by one year durational residence requirement for welfare benefits); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969) (right to vote infringed by limitation of franchise in school district elections to residents eligible to vote in state and federal elections who in addition are lessees or owners of real property within the district or parents or custodians of children enrolled in the district schools).

*supra*; *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895-899 (1961); *Bailey v. Richardson*, 182 F. 2d 46, 57 (D.C. Cir. 1950), *aff'd* 341 U.S. 918 (1951); *Taylor and Marshall v. Beckham*, 178 U.S. 548 (1900); *Ex parte Sawyer*, 124 U.S. 200 (1888); *Butler v. Commonwealth of Pennsylvania*, 51 U.S. (10 How.) 402 (1850); *Crenshaw v. United States*, 134 U.S. 99 (1890). See also *Kirk v. Board of Regents*, 79 Cal. Rptr. 260, 266 (1969), *appl. dismiss'd* 396 U.S. 554 (1970) (identifying the opportunity for higher public education with the opportunity for public employment and holding that no fundamental right was infringed by a durational residence requirement of one year for reduced tuition).\*

Properly viewed, "close judicial scrutiny" requires a different kind of analysis than the "compelling state interest test".

"Close judicial scrutiny" analyzes the relationship between the "suspect" criterion employed in defining the class and the objectives of the statute, or "state interests". Once the burden of establishing that the criterion is "necessary" to the achievement of the state interests is met, the judicial inquiry is at an end. *Loving v. Virginia*, *supra* at 11; *McLaughlin v. Florida*, *supra* at 196. There is no occasion for the court to proceed to weigh the state interests to determine whether they are "compelling" since the employment of a suspect criterion does not *simpliciter* infringe a constitutional or fundamental right, as here, the use of alienage as a criterion does not infringe any such right possessed by aliens. Thus, a "suspect" criterion may be examined for its appropriateness in achieving the

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\* In stating that employment in the career civil service is not a constitutional or fundamental right, appellants do not contend that public employment is a "privilege" and thereby immune from constitutional scrutiny, *Board of Regents v. Roth*, *supra* at 5081 n. 9, but only that an individual's interest in following this occupation is not of such dimension as to require the application of the "compelling state interest test."



state interests reflected by the statute and compared with other means, if any, for achieving the same purpose, as here § 53 may be examined for its "necessary" relationship to the state interests in integrity and efficiency of the career civil service which it effectuates. Since criterion is merely a means of achieving certain state interests, it cannot be compared or weighed against the interests themselves, as here "alienage" cannot be weighed against the integrity and efficiency of the career civil service.

The balancing process is only appropriate under the "compelling state test" where specific substantive rights are infringed by the operation of the statute which, in turn, can be "weighed" against the significance of the state interests. Thus, in *Dunn v. Blumstein, supra*, the fundamental right to vote and to travel could be weighed against the administrative conveniences and community interests served by a durational residence requirement for voting; in *Williams v. Rhodes, supra*, the fundamental right to vote and to free association could be weighed against the state interests in avoiding the consequences to electoral process of political splinter groups; and in *Shapiro v. Thompson, supra*, the fundamental right to travel could be weighed against the administrative conveniences served by a durational residence requirement for welfare benefits. No such substantive rights of aliens are affected by the operation of § 53 and thus, there is no occasion to "weigh" the significance of the state interests here involved. Indeed to do so would be inconsistent with the latitude traditionally afforded the public employer in qualifying and regulating its employees where the efficient operations of government are involved. *United Public Workers v. Mitchell, supra*. See discussion pp. 13-15 *ante*.

However, assuming that this Court reviews § 53 as to its "necessary" relation to the state interests reflected by statute and then balances those interests against the interests of the aliens affected, the statute is constitutional under the Equal Protection Clause.

B. The distinction between citizens and aliens established by Civil Service Law § 53 bears a "necessary" relation to the state interests of integrity and efficiency in the career civil service. The State must consider the alien's primary allegiance to the country of his nationality and the special privileges and burdens incident to alien status in determining his suitability for public employment. These state interests can be achieved and the competitive character of the career civil service maintained only through the use of a rule of general application like § 53.

The validity of the state interest in employing citizens to conduct its internal affairs is apparent. It rests on the fundamental concept of identity between a government and the members, or citizens, of the state. *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (opinion of FRANKFURTER, J. concurring); *United States v. Cruikshank*, 92 U.S. 542, 549 (1876); *Minor v. Happersett*, 21 Wall. 162, 165-166 (1875). Thus in practically every nation aliens may not exercise political rights, hold elective office or obtain employment in the career civil service. Roth, *The Minimum Standard of International Law Applied to Aliens* 151-154 (1949); See generally United Nations Department of Economic and Social Affairs, Public Administration Branch, *Handbook of Civil Service Laws and Practices* (1966).\*

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\* The practice of the federal government and of the State of New York illustrate this concept. The United States Constitution requires that the President be a natural born citizen (Art. 2, § 1); a Senator, a citizen for nine years (Art. 1, § 2; a Representative, a citizen for seven years (Art. 1, § 2). As noted at pp. 14-15, *ante*, the citizenship requirements for the federal career service are substantially identical with New York Civil Service Law § 53. See Exhibit "1". The New York State Constitution requires citizenship of the Governor and Lieutenant Governor (Art. 4, § 2); members of the Legislature (Art. 3, § 7); and voters (Art. 2, § 1). New York State also requires citizenship of public officers (Public Officers Law § 3); attorneys (Judiciary Law § 460); and trial and grand jurors (Judiciary Law §§ 504[1], 531[3], 596[1], 609[1], 662[1], 684[1]).

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Like the elected official, the civil servant should be capable of representing the public interest with complete integrity. He participates directly in the formulation and execution of government policy and thus must be free of obligations, including those to a foreign state, which might impair the exercise of his judgment or jeopardize public confidence in his objectivity. See *United Public Workers v. Mitchell*, *supra* at 97-101 and opinion of DOUGLAS, J. dissenting in part at 121-122. This is true of all positions within the career service, *United Public Workers v. Mitchell*, *supra* at 102, particularly those in the administrative category held by the named appellees. *United Public Workers v. Mitchell*, *supra* at 122 (opinion of DOUGLAS, J. dissenting in part).\*

The significance which the State of New York attaches to the integrity of its employees in representing the public interest is reflected by the requirement that all employees of the state and its subdivisions, except employees in the labor class, take an oath or file a statement pledging to

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The citizenship requirement for appointment to the career civil service was added to the N.Y. Civil Service Law and to the Rules for the Classified Service of the State of New York by N.Y.L. 1939 c. 767 §§ 1, 2 effective June 7, 1939. Prior to that date, the state and local civil service commissions could require citizenship for appointment pursuant to their power to make rules and to ascertain the fitness of applicants. N.Y. Consol. L. 1909 c. 15 §§ 6, subd. 1, 9, 11, 14; N.Y.L. 1889 c. 370 §§ 6, ¶ First, 9, 10, 13. See e.g. *Helleyer v. Prendergast*, 176 App. Div. 383, (2nd Dep't 1917) (sustaining citizenship requirements for public employment and the career civil service in New York City).

\* Indeed, the civil servant has a more proximate relationship to the affairs of government than an attorney employed in the private sector. In contrast to the civil servant's exclusive concern with government, the attorney in private practice is not normally involved in formulating or executing government policy. But see *In re Griffiths*, *supra* (noting instances where Connecticut attorneys act as public officers).

"support the Constitution of the United States and the Constitution of the State of New York". N.Y.S. Const. Art. 13, § 1; Public Officers Law § 10; Civil Service Law § 62.\*

In contrast to the citizen, the alien cannot identify completely with the public interest of the country of his residence. Indeed, the privileges and burdens incident to alien status reflect the alien's primary allegiance to the country of his nationality.\*\* *Harisiades v. Shaughnessy*, *supra* at 585-586; *Carlisle v. United States*, 16 Wall. 147, 154 (1872); Borchard, *Diplomatic Protection of Citizens Abroad* § 6, p. 11 (1927) (hereinafter "Borchard"). Thus the alien may claim the diplomatic protection of the country of his nationality against the country of his residence. *Harisiades v. Shaughnessy*, *supra* at 585. He cannot be obliged to participate in hostilities either against his own country, Article 23, 1907 Hague Convention Respecting the Laws and Customs of War on Land, 36 Stat. 2301-2302, or when his country is a neutral, 4 Moore, *International Law Digest* § 3548, pp. 52-53 (1906). In the United States, aliens are eligible for the draft only if they have immigrant status. 50 U.S.C. App. § 453 (1971). However, the immigrant may obtain an ex-

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\* Such oaths have been repeatedly sustained. *Cole v. Richardson*, — U.S. — (1972), 40 U.S. Law Week 4381 (April 18, 1972) (dissents by Douglas, J. and Marshall and Brennan, JJ., pertain to portions of the Massachusetts oath there in issue not required in New York); *Ohlson v. Phillips*, 397 U.S. 317 (1970); *Knight v. Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967); *aff'd* 390 U.S. 36 (1968). See also *Law Students Civil Rights Research Council v. Wadmond*, *supra* at 161-162, 189-190.

\*\* The alien's allegiance to the country of his nationality is not a matter of individual preference or personal loyalty as the district court suggests (A. 83-84), but an attribute of his nationality which the country offering him hospitality is bound to respect. *Harisiades v. Shaughnessy*, *supra*; 1 Oppenheim, *International Law* §§ 291, 319, 320 (8th ed. 1955).

emption pursuant to treaty\* or change his status to non-immigrant and thereby avoid military service. 8 U.S.C. § 1255.\*\*

Conversely, an alien is subject to certain obligations to the country of his nationality and to certain burdens in the country of residence which again distinguish him from the citizen in terms of his capacity to represent the public interest. The country of the alien's nationality retains the rights of conscription and taxation, *Borchard* § 13, p. 21. The country of residence may deport him, e.g., 8 U.S.C. § 1251, *Carlson v. Landon*, 342 U.S. 524 (1951), or expel him in the event of hostilities with the country of his nationality (and in the absence of treaty provisions), *Borchard* § 46, p. 109, or take less drastic measures such as detention, concentration, or prohibition of residence in certain defined areas, *Borchard* § 46, p. 113. The alien may also be refused re-entry if he leaves the country, e.g., 8 U.S.C. § 1202.

If the alien takes an oath of allegiance to the United States and the State of New York, he does not lose the privileges incident to alien status nor is he relieved of its burdens. That may only be achieved through naturalization.\*\*\* At best, in taking such an oath, an alien evidences

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\* Currently, there are treaties in force with 16 countries exempting their nationals from service in the United States Armed Forces. 8 U.S.C. § 1101 (note).

\*\* Aliens who are non-immigrants may work in the United States. Eg., 8 U.S.C. § 1101 (g) (15) (A) (iii), (B), (E), (F), (H), (J), (K), (L). Since the district court declared § 53 unconstitutional on its face, the decision, unless reversed or modified would permit both non-immigrants and immigrants to compete for the career civil service.

\*\*\* But see 8 U.S.C. § 1481(a)(2) stating, *inter alia*, that an American shall lose his nationality by "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof". However, the validity of 8 U.S.C. § 1481(a)(2) is in doubt following *Afroyim v. Rusk*,

his good faith toward the country of his residence. At worst, he employs it as a device to obtain economic advantages offered by that country. See *Kawakita v. United States*, 343 U.S. 717, 735-736 (1952). However, regardless of motive, the alien cannot place himself on the same footing as a citizen with respect to public employment by indicating his willingness to take the required oath.

Moreover, in purely practical terms, the citizen and the alien are not similarly situated with respect to employment in the career civil service. This branch of public employment is intended to provide the state with continuity in the management of its affairs, *United Public Workers v. Mitchell*, *supra* at 121 (opinion of DOUGLAS, J. dissenting in part), and its designation as the "career civil service" evidences the common understanding that an appointment is commencement of long-term employment covering the career service period of twenty to twenty-five years. The career civil service employee's statutory rights to promotion through examination, tenure,\* seniority preferences and pension benefits are fur-

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(footnote continued from preceding page)

*supra*. There § 1481(a)(5) providing for loss of nationality upon voting in a foreign election was invalidated on the ground that Congress was without power to divest a United States citizen of his nationality without his specific assent. Compare *Rogers v. Bellei*, 401 U.S. 815 (1971), sustaining 8 U.S.C. § 1401(b) providing that a child born abroad to an American citizen and an alien shall lose his American nationality unless he is continuously resident in the United States for five years between the ages of fourteen and twenty-eight. Assuming the validity of legislation like § 1481(a)(2) and its general use among nations, an alien would succeed in relieving himself of his obligations to the country of his nationality if he took the oath required of public employees by the State of New York but only at the cost of becoming a stateless person.

\* Tenure is also granted to certain veterans and volunteer firemen who are not employed in the competitive class, Civil Service Law § 75 subd. 1(b).



ther evidence that career service is intended for the long term employee.\*

As noted, the alien is subject to deportation\*\* and expulsion as well as conscription by the country of his nationality, p. 25 *ante*. In light of these factors, the state cannot be required to place the same reliance on the availability of the alien over the career service period that it does upon the citizen.\*\*\*

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\* E.g. N.Y. Const. Art. 5, § 6; Civil Service Law §§ 50, subd. 1, 51 and 52 (competitive examinations required to determine merit and fitness, for original appointment and promotions); § 61, subd. 1 (requiring the selection of one of every three applicants on eligible list when appointments are made); § 65 (establishing a preference in available positions for applicants successful in examination as against provisional appointees); § 75 (requiring a hearing for removal or other penalty on charges of misconduct or incompetence); § 76 (establishing a right to administrative appeal following disciplinary proceedings); and §§ 80 and 81 (establishing seniority preferences in the event of abolition or consolidation of positions and for reinstatement. See also N.Y. Retirement and Social Security Law establishing the New York State Employees Retirement System and N.Y.C. Administrative Code § B83-1.0 et seq. establishing the New York City Employees' Retirement System (providing for mandatory membership by competitive class employees, vested rights generally after five years of service and full benefits upon retirement after twenty or twenty-five years depending on the member's title.)

\*\* 17,639 aliens were deported during fiscal 1971 (1971 Annual Report of the Immigration and Naturalization Service); 16,893, during fiscal 1970 (1970 Annual Report of the Immigration and Naturalization Service); and 10,505, during fiscal 1969 (1969 Annual Report of the Immigration and Naturalization Service).

\*\*\* The district court's comparison between the risk to the service from the departing alien and the citizen who moves interstate is inapposite since it fails to take account of the fact that the alien's departure may well be involuntary. (A. 85). Further the statutory rights incident to competitive class employment (first footnote this page) are intended to encourage voluntary continuation in service. They amply support the conclusion that the career service employee will not lightly disregard the benefits that accrue through length of service to start afresh in a different state.

The fact that aliens may compete for positions in the career civil service when waivers are in effect pursuant to § 53, subd. 2 does not invalidate the instant classification. Cf. *Dunn v. Blumstein*, *supra* 357-360.

The terms of the statute provide that the citizenship requirement may be waived only upon a finding that "an acute shortage of employees exists in any particular class or classes of positions." In face of such a shortage, the need of the government to conduct its business in an orderly manner outweighs the risks to the career service occasioned by the employment of aliens. However, the statute recognizes these risks in requiring that the alien appointed under waivers "shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship." In imposing this limitation, the risks occasioned the service are reduced to the minimum consistent with the government's conduct of its affairs.

The competitive character of the career civil service and the promotional opportunities afforded an employee in that class of positions require that the risks embodied in the public employment of aliens be expressed in a rule of general application like § 53.

The career civil service is a "merit system". See generally *United Public Workers v. Mitchell*, *supra* at 96-103 and opinion of DOUGLAS, J. dissenting in part at 120-125. Positions are ranged within occupational groups in order of degree of responsibility, or by "title". Appointments and promotions are based on success in examination requiring uniform conditions of competition.\* Thus a title must be either open or closed to aliens. In selecting among applicants, the public employer's discretion to consider the suitability of an applicant in terms other than his success in examination is severely circumscribed. He must select one from among three applicants standing highest

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\* N.Y.S. Const. Art. 5, § 6; Civil Service Law §§ 44, 50, 51, 52.



on a list established on the basis of competitive examination or leave the position vacant.\* Thus, if one or more aliens is among the group of three applicants, the opportunity for appointing authority to reject the alien as unsuitable because of his conflicting allegiance and the other incidents of alien status would be very limited, if not non-existent. If he did reject the alien, his choice would then be limited to the remaining citizens, or citizen, regardless of whether he believed them otherwise qualified. In this manner, the narrow discretion allowed the appointing authority to select from among three equally situated applicants would be frustrated, if not entirely removed.

Once appointed, the employee accrues a statutory right to compete for the next higher title,\*\* as well as rights to tenure, seniority preferences and pension benefits.\*\*\* His opportunities for promotion continue until the highest title in the occupational group is reached. Throughout the process, the appointing authority must choose one out of the three applicants standing highest on the list established following examination for the particular title.\*\*\*\*

In view of these characteristics of the career civil service, the consideration of alien status in terms of an applicant's qualifications for appointment cannot be effective if left to the exercise of administrative discretion. Indeed, in the absence of a rule of general application, it is apparent that the stringent limitations imposed on public employer's discretion in selecting among applicants and the promotional rights afforded the employee upon appointment would require that the alien be treated on iden-

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\* Civil Service Law § 61, subd. 1.

\*\* Civil Service Law § 52.

\*\*\* See footnote p. 27, *ante*.

\*\*\*\* Civil Service Law § 61, subd. 1.

tical terms with the citizen in the entire range of positions within that class.\*

In contrast, a rule of general application is not required in the exempt and non-competitive classes.\*\* These classes contain discrete positions,\*\*\* place no limitations on the public employer's discretion in the selection process\*\*\*\* and do not vest the employee with any statutory right to compete for promotion to higher "titles". Thus, in making an appointment to these classes, the public employer is free to consider the alien status of the applicant among his other qualifications and to balance the risks occasioned

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\* It is equally apparent that the suggestion that career civil service positions requiring citizenship can be segregated from those which do not must be rejected. See concurring opinion of *Lumbard, C. J. (A. 90).*, and *Jalil v. Hampton, supra*, at p. 12, (remanding consideration of the federal career service citizenship requirements for a determination, *inter alia*, of the type of positions where citizenship is a *bona fide* qualification). If the premise is accepted that citizenship is more relevant for some positions than for others, it follows that the significance attached to it is determined by the degree of responsibility incident to the position. However, as noted, the characteristics of the career civil service require that once an alien is appointed to the service he be afforded right to compete for positions of increasing responsibility on the same terms as citizens. Thus it is impossible as a practical matter, and indeed, inconsistent with statutory rights afforded career employees, to employ the alien in an entrance level or middle echelon position and to then deny him access to the positions of higher responsibility. See also *United Public Workers v. Mitchell, supra* at 102-103 (rejecting the suggestion that only civil service employees in administrative categories, not industrial workers, should be subject to the Hatch Act).

\*\* The citizenship requirements for the laborers on public works are set forth in N.Y. Labor Law § 222.

\*\*\* Civil Service Law §§ 41, 42.

\*\*\*\* A non-competitive employee is required to pass a "non-competitive examination" (Civil Service Law § 42) usually consisting of a review of his experience. The public employer is not required to select one of three applicants in making appointments to the non-competitive class. Cf. Civil Service Law § 61, subd. 1.

by that status against the need for the alien's talents. If he chooses to employ the alien, his selection has no significance beyond the immediate situation. His choice among future applicants is not limited, and his decision has no effect on positions of higher responsibility within those classes.\* Moreover, the career civil service is the only class of positions designed to insure continuity of service and thus the only class where the availability of the applicant over the long term is a relevant consideration. See discussion pp. 26-27, *ante*.

**C. The state interests supporting Civil Service Law § 53 outweigh the interests of the aliens affected by the classification.**

To determine whether the governmental objectives supporting a classification are "compelling", the Court must weigh the state interests reflected in the statute against the interests of the individuals in the affected class.\*\* If the governmental objectives preponderate, the statute must be sustained. *Dunn v. Blumstein*, *supra* at 335; *Williams v. Rhodes*, *supra* at 30; *Shapiro v. Thompson*, *supra* at 683.

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\* The suggestion of the district court that the exempt and non-competitive classes contain "more responsible positions" than the career civil service is without foundation (A. 91-92 n. 6). For example, the following positions are included in the career civil service: Chief Investment Officer (starting salary, \$32,169), Chief Accountant Public Service (\$23,599), Director of Special Investigation (\$27,640), Assistant Director of Workmen's Compensation Board Operations (\$26,230), Director of Labor Standards (\$27,640).

\*\* As argued in subpoint A, *ante*, the "compelling state interest test" is only properly applied to classifications which infringe specific constitutional or fundamental rights of the members in the affected class. Civil Service Law § 53 does not infringe any constitutional or fundamental right of aliens. Accordingly, the discussion which follows is in terms of the aliens' "interests", not rights.

Appellants have already established that the state interests reflected in § 53 are valid. The government cannot be required to conduct its affairs through the agency of persons who are not members of the state and who cannot bear it complete allegiance; it cannot be required to employ persons who by reason of their foreign allegiance and the special privileges and burdens of alien status and do not have the capacity to identify completely with the public interest. Appellants have likewise established that these interests can only be given effect in the career civil service through the use of a rule of general application like § 53 (Subpoint B, *ante*). Compare *Dunn v. Blumstein*, *supra* at 345-360; *Williams v. Rhodes*, *supra* at 31-34 and *Shapiro v. Thompson*, *supra* at 633-638, in which this Court found that the state interests there involved could be achieved by "less drastic means." Cf. *Shelton v. Tucker*, 364 U.S. 479, 488 (1965).

In contrast, the aliens' interest in the career civil service is merely the expectancy of an appointment if he succeeds in the examination and selection process. *Board of Regents v. Roth*, *supra* at 5082-5083. The significance of even this interest is reduced by the fact that the alien may compete for the career service when waivers are in effect under § 53, subd. 2.

Moreover, the alien has it within his power to be treated identically with citizens for all purposes simply by seeking naturalization. If he chooses to retain his allegiance to the country of his nationality while pursuing the economic advantages of a career here, the United States and the State of New York permit him to do so, but in accordance with the alien's choice, continue to recognize his identity with his homeland. See *Harisiades v. Shaughnessy*, *supra* at 585-588.

## POINT II

Civil Service Law § 53 does not conflict with any federal statute or with any paramount federal policy prohibiting the states from denying aliens entrance and abode. Congress has not undertaken to regulate aliens in terms of their suitability for employment by the states, and federal policy, as expressed with respect to the federal career service, is identical with that of the State of New York under § 53.

The State of New York has enacted § 53 pursuant to its sovereign power to determine the qualifications of its own employees. This power is reserved to the states under the Tenth Amendment. It has not been delegated to Congress. *Maryland v. Wirtz*, 392 U.S. 183, 196-199 (1968) and opinion of DOUGLAS, J. dissenting at 205; *State of New York v. United States*, 326 U.S. 572, 582 (1946) (opinion of FRANKFURTER, J.), opinion of STONE, J. concurring at 587 and opinion of DOUGLAS, J. dissenting at 592-596.

That the particular qualification here in issue is concerned with alien status does not make it an inappropriate exercise of the states' Tenth Amendment power. On the contrary, it is a decision the state is entitled to make for reasons satisfactory to its people.

This Court has repeatedly recognized the states' power to make laws with respect to aliens notwithstanding the federal power to conduct foreign relations of the United States, U.S. Const. Art. 1, § 8, cl. 3, Art. 2, § 2, cl.2,\* and

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\* *Clark v. Allen*, 331 U.S. 503 (1947) (sustaining the validity of a California reciprocity statute conditioning the distribution of decedents' personal property to alien non-residents); *Zschernig v. Miller*, 389 U.S. 429, 435 (1968) (invalidating application of similar Oregon statute used to make "minute inquiries concerning the actual administration of foreign law . . . [and] into the credibility of foreign diplomats" but acknowledging the states' power to legislate in this area.)

despite the Congressional power to establish a "uniform Rule of Naturalization", U.S. Const. Art. 1, § 8, cl. 4.\*

Even if the wholly revolutionary assumption be made that Congress could legislate with respect to the qualifications of the employees of the several states, it certainly has not done so in the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.* or in 42 U.S.C. § 1981. The incongruous position of the district court on this point is demonstrated by the federal career service regulations which treat aliens in the same manner as § 53.

**A. Congress has not enacted a comprehensive plan which pre-empts the states from considering alien status in determining the qualifications of public employees.**

Congress has not legislated with respect to aliens' qualifications for public employment in the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.*\*\* It has merely provided, as in § 1182(a)(14), that the entering alien obtain a certificate from the Secretary of Labor indicating that his first job in the United States will not adversely effect unemployment at his destination or wages and making conditions in his particularr trade.\*\*\* Compare *Graham v. Richardson*, *supra* at 377 citing extensive provisions of the Immigration and Nationality dealing expressly with indigent aliens).

Section 1182(a)(14) and related provisions cannot be read to evidence Congressional intent to preclude further consideration of alien status in the numerous career pos-

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\* *Graham v. Richardson*, *supra* at 372; *Takahashi v. Fish & Game Commission*, *supra* at 419-420.

\*\* The legislative history of the act is similarly silent of any intent to regulate in this field. 1952 U.S. Code and Admin. News 1651.

\*\*\* See also 8 U.S.C. § 1152(a)(3) (giving priority in the issuance of immigrant visas to persons with professional training or exceptional ability in the sciences or arts) and § 1153(a)(6) (giving priority to skilled or unskilled laborers where a shortage exists in the United States).



sibilities the alien might pursue after entry, including public employment.\* See *Florida Avocado Growers v. Paul*, 373 U.S. 132, 140 (1963) (rejecting argument that federal certification of avocados as "mature" precluded California from requiring an additional and more stringent standard of maturity). Indeed, such an interpretation would be inconsistent with the Secretary of Labor's establishment of occupational categories which are closed to aliens. See 29 C.F.R. §§ 60.2(a)(2), 60.7 Schedule B (1972).

Even assuming that the certification provisions of the Immigration and Nationality Act look beyond the alien's first job in the United States, § 53 must be sustained unless it stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Florida Avocado Growers v. Paul*, *supra* at 141; *Swift v. Wickham & Co. Inc.*, 230 F. Supp. 398, 406 (S.D.N.Y. 1964) *aff'd* 364 F. 2d 241 (2d Cir. 1966), *cert. den'd* 385 U.S. 1036 (1967). Congress has repeatedly enacted legislation refusing budgetary authorization for aliens appointed to the federal career service.\*\* Accordingly, Section 53 cannot be deemed an "obstacle" to the accomplishment of any Congressional purpose or policy. *DeVeau v. Braisted*, 363 U.S. 144, 156 (1960).

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\* When the named appellees entered the United States, they were certified for jobs in the private sector unrelated to their subsequent positions with the City of New York. (See Deft's Exhibit "1"; A.56[3]; Deft's Exhibit "2"; A.62[2]; Deft's Exhibit "3"; A.68[3]; Deft's Exhibit "4"; A.73[3].)

\*\* General Government Appropriations Act, 1972, Pub. L. 92-49, 85 Stat. 108 § 602 (excerpted at Exhibit "1"); Public Works Appropriation Act, 1971, Pub. L. 91-431, 84 Stat. 890 § 502; Public Works Appropriation Act, 1970, Pub. L. 91-144, 83 Stat. 336-7 § 502. These acts reflect the policy of the United States Civil Service Commission as set forth in 5 C.F.R. 338.101 (1972). The authorization contained in the acts for the payment of declarant aliens was not intended as a change in that policy. *Mow Sun Wong v. Hampton*, *supra* at 531.



Moreover, the qualifications of public employees of the several states are particularly inappropriate for federal pre-emption. See *Florida Avocado Growers v. Paul*, *supra* at 143, 146. Compare *Hines v. Davidowitz*, *supra* (invalidating Pennsylvania alien registration law following enactment of express federal statute applicable to all aliens residing in the United States where uniform national rule was appropriate).

Reliance on 42 U.S.C. § 1981 as precluding the enforcement of § 53 is similarly inappropriate. Access to public employment is not a matter of the "security of persons and property" within the meaning of the statute. *Heim v. McCall*, *supra* at 193-194 (construing identical language in a treaty with Italy and sustaining the exclusion of aliens from public works). See also *Pastone v. Pennsylvania*, *supra* at 145 (construing same language and sustaining prohibition on aliens hunting wild game).

**B. Civil Service Law § 53, does not erect an obstacle to aliens entering and abiding within the State of New York inconsistent with federal policy.**

The federal government places the same limitations on the employment of aliens in its career service as does the State of New York under § 53. See discussion at pp. 14-15, 35, *ante* and Exhibit "1". Accordingly § 53 cannot be regarded as inconsistent with any "paramount" federal policy. Cf. *Graham v. Richardson*, *supra* at 378-380.

In relying on *Truax v. Raich*, 239 U.S. 33 (1915) and *Graham v. Richardson*, *supra*, in this context, the district court misapprehended the relevance of those cases to the case at bar.

In *Truax*, the court invalidated an Arizona statute which barred aliens from "the entire field of industry with the exception of enterprises that are relatively very small", 239 U.S. *supra* at 40, finding that the effect of that legislation

was to deny aliens "the ordinary means of earning a livelihood . . . in the common occupations of the community . . . ." 239 U.S. *supra* at 41. In *Graham*, the court invalidated Pennsylvania and Arizona statutes which had conditioned the necessities of life on citizenship or an alien's long term residence although the alien and the citizen were identically situated with respect to the individual and state interests there involved.

Public employment is not a "common occupation of the community." This distinction is clear in *Truax* since it was decided with *Heim v. McCall*, *supra* and *Crane v. New York*, *supra*, which sustained limitations on the employment of aliens on public works projects. As appellants have shown, the unique relationship between the public employee and the State requires that the distinctions inherent in alien status be recognized, and, with respect to the career civil service, effectuated by a rule of general application. See Point I.

Moreover, the narrow and transitory limitation embodied in § 53 cannot be equated with restrictions in *Truax* and *Graham*. For a state to foreclose aliens from practically every job in the private sector or to deny him the necessities of life should he become indigent is the equivalent of denying him entrance and abode. A transitory limitation on an alien's opportunity to compete for appointment in one class of public employment does not have the same effect as evidenced by the fact that notwithstanding enforcement of § 53 on a statewide basis since 1939, New York State has the largest number of alien residents of any State in the Union with the exception of California.\*

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\* In 1971 there were 4,227,219 aliens living in the United States. California had the largest concentration with 996,107, New York was second with 723,075, and Florida, third with 314,596. 1971 Annual Report of Immigration and Naturalization Service Table 34.

## CONCLUSION

**The decision below should be reversed and the complaint dismissed.**

Dated: New York, New York, August 30, 1972.

Respectfully submitted,

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
*Intervenor-Appellant*

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

JUDITH A. GORDON  
Assistant Attorney General  
*of Counsel*

## Exhibit "1"

5 U.S.C. § 3301 states in pertinent part:

The President may—

- (1) Prescribe such regulations in the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
- (2) ascertain the fitness of applicants as to age, health, character, knowledge and ability for the employment sought; and
- (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

• • •

General Government Appropriations Act, 1972, Pub. L. 92-49, 85 Stat. 108 § 602 States in pertinent part:

[N]o part of any appropriation contained in this or any other Act shall be used to pay the compensation of any officer or employee of the Government of the United States . . . whose post or duty is in continental United States unless such person (1) is a citizen of the United States. . . .\*

Executive Order 10577, November 22, 1954, 19 Fed. Reg. 7521, § 2.1 states in pertinent part:

(a) . . . The [Civil Service] Commission is authorized to establish standards with respect to citizenship, age, education, training and experience, suitability, and physical and mental fitness, and for residence or other requirements which applicants must meet to be admitted to or rated in examinations.

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\* See also Public Works Appropriations Act, 1971, Pub. L. 91-431, 84 Stat. 890 § 502; Public Works Appropriations Act, 1970, Pub. L. 91-144, 83 Stat. 336-7 § 502.

5 C.F.R. § 338.101 (1972) states in pertinent part:

(a) A person may be admitted to competitive examination only if he is a citizen of or owes permanent allegiance to the United States.

(b) A person may be given appointment only if he is a citizen of or owes permanent allegiance to the United States. However, a noncitizen may be given (1) a limited executive assignment under Section 305.509 of this chapter in the absence of qualified citizens or (2) an appointment in rare cases under section 316.601 of this chapter, unless the appointment is prohibited by statute.

Supreme Court of the United States

No. 1221

JOHN B. CLARK, Appellant, v. The New York City Police Department, and JAMES J. HENNING, City Clerk of Police, and Charles W. Smith, New York City Civil Service Commission.

Argued.

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PATRICIA M. L. LORRAINE, Appellant, v. JAMES J. HENNING, City Clerk of Police, and Charles W. Smith, New York City Civil Service Commission.

Argued.

JOHN B. CLARK, Appellant, v. The New York City Police Department, and JAMES J. HENNING, City Clerk of Police, and Charles W. Smith, New York City Civil Service Commission.

NOTE FOR ATTORNEYS

APPEAL

U.S. Supreme Court

1964

U.S. Supreme Court

U.S. Supreme Court

FILED  
OCT 19 1972  
NORRIS, JR., CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1971

\_\_\_\_\_  
No. 71-1222  
\_\_\_\_\_

JULE M. SUGARMAN, Administrator of the  
New York City Human Resources Administra-  
tion and HARRY I. BRONSTEIN, City  
Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

v.

PATRICK Mc L. DOUGALL, ESPERANZA  
JORGE, TERESA VARGAS, and SYLVIA  
CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

\_\_\_\_\_  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK  
\_\_\_\_\_

**BRIEF FOR APPELLEES**  
\_\_\_\_\_

LESTER EVENS

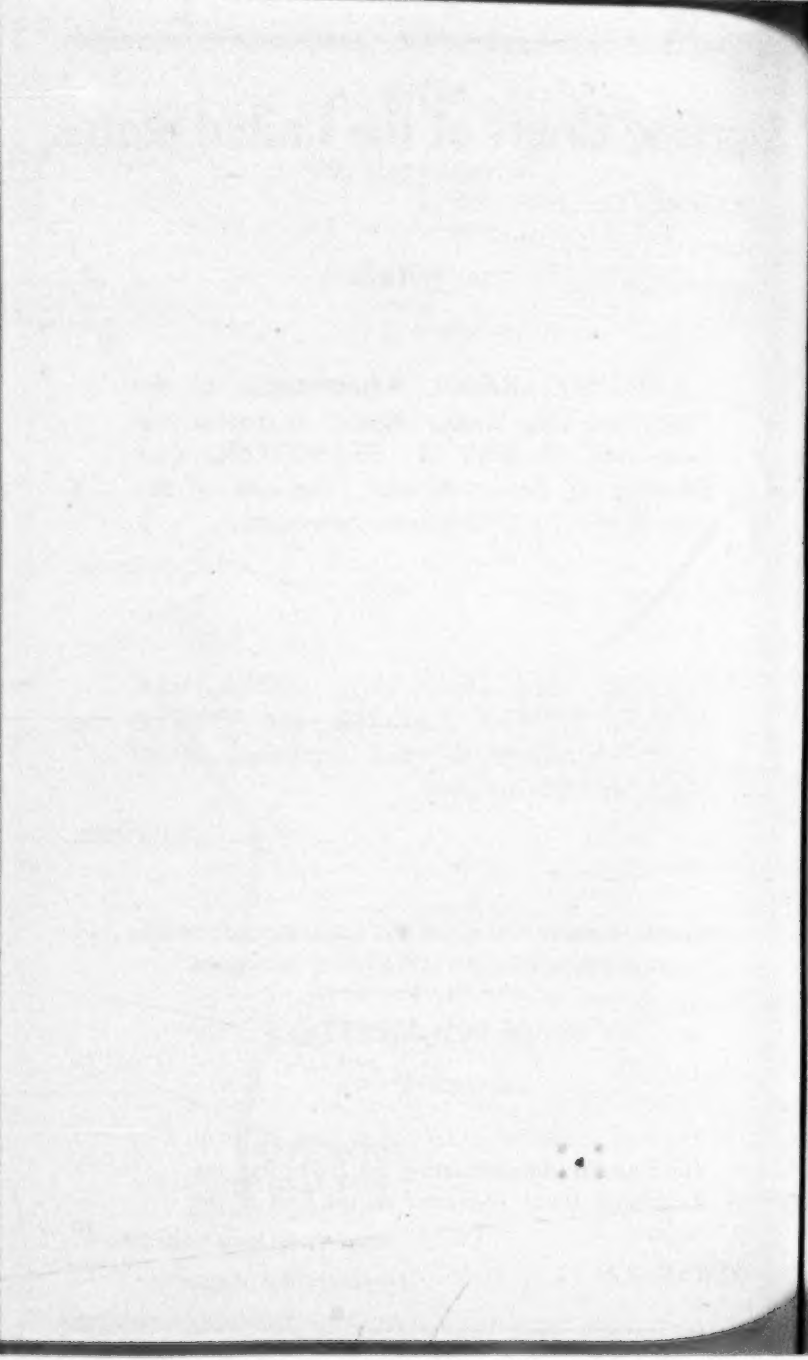
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New York Civil Service Law §53 subd. 1 .....	passim

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Charter of the Organization of American States, Chapter VII, Article 29 .....	16
Charter of the Organization of American States, 2 UST 2394 (1951) .....	16
United Nations Charter, Chapter 1, Article I, Subparagraph (2) .....	16
United Nations Charter 59 Stat. 1031 .....	16

*Other Authorities:*

38 Geo. Wash. L.R., Discrimination Against Mexican Aliens .....	8
12 Stan. L. Rev. 355, 369 (1960), National Power To Control State Discrimination Against Foreign Goods and Persons: A Study in Federalism .....	15
71 Yale Law Journal 760 (1962) General Note .....	12
56 N.Y. Jur., Statutes §113 .....	20
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56 N.Y. Jur., Statutes §123 .....	20

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

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No. 71-1222

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JULE M. SUGARMAN, Administrator of the  
New York City Human Resources Administra-  
tion and HARRY I. BRONSTEIN, City  
Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

v.

PATRICK Mc L. DOUGALL, ESPERANZA  
JORGE, TERESA VARGAS, and SYLVIA  
CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR APPELLEES**

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**STATEMENT OF THE CASE**

The named Appellees are four of approximately  
twenty permanent resident aliens who, prior to December  
28, 1970, were employed by private organizations which

were merged into the New York City Human Resources Administration on that date. The City program was directed to the improvement of job skills among the unemployed and the under-employed. When the private organizations were merged into the City program, plaintiffs were hired by the City, and assured their positions and salaries would be the same. Shortly after their City employment commenced, however, plaintiffs were discharged pursuant to New York Civil Service Law §53 subd. 1. (McKinney 1959), solely because of their alienage.

The amended complaint sought the convening of a three-judge court, an order that the action be maintained as a class action pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, a temporary restraining order pursuant to 28 U.S.C. §2284(3), a declaratory judgment pursuant to 28 U.S.C. §2201 and 2204 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, preliminary and permanent injunctions and damages to each plaintiff of \$10,000 for lost earnings. (A 10-12).

On March 11, 1971, by order to show cause plaintiffs, alleging that Section 53 violated the Equal Protection Clause of the Fourteenth Amendment, the Supremacy Clause of the Constitution, and their right to travel among the states, moved an order treating the named plaintiffs as representatives of a class, the convening of a three-judge court, preliminary and permanent injunctive relief.

On May 4, 1971, appellants moved to dismiss the action for lack of jurisdiction over the subject matter (A 30-34).

On July 13, 1971, the appellants moved for a summary judgment dismissing. (A 74-77).



The single District Court judge found plaintiffs raised a substantial constitutional question and recommended the convening of a three-judge court.

Pursuant to the May 26, 1971 order of Chief Judge Henry J. Friendly, plaintiffs' motion for declaratory judgment, injunctive relief and determination of class action were submitted to the statutory three-judge court which heard argument on July 13, 1971.

### SUMMARY OF ARGUMENT

New York Civil Service Law §53 subdivision 1. excludes aliens from the competitive class of civil service employment denying Appellees, who are lawful resident aliens, the equal protection of the laws.

Classifications based on alienage are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365 (1971).

Excluding the entire class of aliens from civil service employment satisfies no compelling state interest and bears no rational relationship to Appellees' competence or fitness for employment.

The Appellant argues that compelling state interest demands loyalty from employees that only citizens can provide. If New York is concerned with matters of security then the state is endeavoring to pre-empt the exclusive power of Congress and the federal government. When the Appellant endeavors to overcome the Supremacy Clause on the basis of a greater loyalty, the argument fails because it is irreconcilable with other

sections of the Civil Service Law that do not exclude non-citizens.\*

The Appellant also states that aliens are unstable and the need for stable and efficient government requires hiring citizens. No demonstration is made, for instance, that resident aliens residing in New York are less stable than citizens entering New York from other states.

The efficiency and stability argument is nothing more than an attempt to reserve the economic resources of the state for citizens. The court has stated that discrimination based on economics is without justification. *Graham v. Richardson*, 403 U.S. 365 (1971).

The power to regulate aliens is exclusively the power of the federal government. Congress has promulgated a comprehensive plan for regulation of immigration and naturalization and has granted aliens the full and equal benefits of all laws. 42 U.S.C. §1981 (1970). §53 subdivision 1. infringes upon this exclusive power of Congress.

Denying civil service employment to aliens in effect denies aliens the right to enter and reside in New York and violates their constitutional rights. Limitations on employment works to segregate aliens and exclude them from New York.

The language of the statute, in question, is clear and unambiguous and inquiry into legislative intent elicits no

\*New York Civil Service Law Section 35 states that civil service is divided into the classified and unclassified service. Sections 41, 42, 43 and 44 describe the classified services.

§41. Exempt Class

§42. Non-Competitive Class

§43. Labor Class

§44. Competitive Class

expression of intention by the legislature. An examination of the history of the year of enactment and perusal of various unofficial communications provide little except support for the unconstitutionality of the statute.

## ARGUMENT

### I.

**NEW YORK CIVIL SERVICE LAW §53 SUBDIVISION 1., WHICH EXCLUDES ALIENS FROM THE COMPETITIVE CLASS OF CIVIL SERVICE EMPLOYMENT IS "INHERENTLY SUSPECT" AND DISCRIMINATES UNREASONABLY AGAINST ALIENS AND THUS DENIES THEM THE EQUAL PROTECTION OF THE LAWS.**

To qualify for the competitive class of civil service employment a person must be a citizen of the United States. Such classification is inherently suspect. It bears no relationship to an individual's character or competence to fill a position. Therefore, the statute denies the equal protection of the laws to lawful resident aliens such as Appellees.

#### **A. Laws Which Deny Aliens Lawful Employment Are Inherently Suspect and Subject To Close Judicial Scrutiny.**

Clearly, aliens are "persons" and thus protected by the Equal Protection Clause of the Fourteenth Amendment, *Graham v. Richardson*, 403 U.S. 365, at 376, (1971); *Yick Wo v. Hopkins*, 118 U.S. 356, 369(1886), (rights of Chinese aliens to work unmolested in laundries); *Galvan v. Press*, 347 U.S. 522, 530 (1954). "So long settled as to be beyond the pale of controversy is the proposition that

the long reach of the Fourteenth Amendment extends to the alien." *Hosier v. Evans*, 314 F. Supp. 316, 319 (D.C. Virgin Islands, 1970). Moreover, discrimination against individuals on the basis of alienage "like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. *Graham v. Richardson*, 403 U.S. 365, (1971); *Oyama v. California*, 332 U.S. 633, 640, 646 (1948); *Takahashi v. Fish and Game Commission*, 335 U.S. 410, 420 (1948); *Sei Fujii v. State*, 79 Cal. Rptr 77, 86, 456 P2d 645, 654 (1969). Such criteria for classification are "constitutionally suspect", *Bolling v. Sharpe*, 347 U.S. 497, (1954) for the obvious reason that such considerations are generally irrelevant to constitutionally acceptable legislative purposes, often masking simple prejudice or irrational antagonism toward groups of people. As with race, this has also been true of discrimination against aliens and nationality groups, which historically has been rooted in deep prejudice, hostility for fear of the foreigner.

"Aliens as a class are a prime example of a discrete and insular minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n. 4 (1938) for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi*, 335 U.S., at 420, that . . . the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Graham*, 403 U.S. 365, 375.

The Court also said, as it had earlier in *Takahashi* where it struck down a California statute denying fishing licenses to aliens, that discrimination based on alienage as discrimination based on race is "inherently suspect". *Graham v. Richardson*, *supra*.

Denied the right to vote, aliens "lack the most basic means of defending themselves in the political processes. Under such circumstances, courts should approach discriminatory legislation with special solicitude". *Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566, 79 Cal. Rptr. 77, 456 P.2d 645, (1969) (holding public employment citizenship requirements unconstitutional).

In *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 710, (1915), Arizona's statute which limited to 20% of the work force the number of aliens who could be employed by any business of more than 5 workers was held violative of the Fourteenth Amendment:

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

*Takahashi, supra*, has narrowed the special public interest doctrine arising from the distinction between "rights and privileges" as enunciated in *Heim v. McCall*, 239 U.S. 175 (1915).

"In *Graham v. Richardson* 403 U.S. 365, 374 (1971) the Court said:

"But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as 'privilege.' *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U.S. at 627, n. 6; *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Bell v. Burson*, 402 U.S. 535 (1971)."

In *Takahashi, supra*, and *Shapiro, supra*, the Court found the various states did not meet the heavy burden of justifying their statutory discriminations. The preservation of public funds was not a compelling need. Cf. *Shapiro, supra*, and *Takahashi, supra*.

"Since aliens contribute to the public treasury by paying state and local taxes, they have the same interest as citizens for expenditures of such funds. In fact, an alien may have contributed funds to the state government for years and yet be excluded from working for the state, while a recent arrival to the state, although he has made little if any contribution to the state can become a public employee if he is a United States citizen." *Discrimination Against Mexican Aliens*, 38 Geo. Wash. L.R.

Aliens not only pay taxes but they are bound by federal, state and local laws. They must observe traffic, sanitation, health and compulsory education laws. They are bound by the individual state rules for marriage and divorce. Aliens are bound by and subject to every law, code and rule in the conduct of their business or employment.

They pay Federal and local income and inheritance taxes and all other local taxes, such as sales and real property taxes. As taxpayers they are entitled to enjoy the economic fruits of the taxes they pay and when indigent they are entitled to welfare.

**B. The Exclusion of Lawful Resident  
Aliens From the Competitive Class  
of Civil Service Employment Poses  
No Compelling State Interest.**

The Appellant contended that New York State was justified in excluding aliens from the competitive class on two grounds: First, the exclusion of aliens is related to efficient and stable government administration and secondly, the state government is entitled to employ persons of undivided loyalty.

The Three-Judge Court pointed out, in its decision, that the Appellant has not demonstrated that a permanent resident alien would be a poorer risk than a citizen of the United States. The Court took judicial notice of the mobility of "today's society" and that numerous people move to major urban areas for short periods to pursue adventure, glamour, and career experience. (A 84-85).

The Appellant argued that aliens are less likely to remain in the United States than citizens, but offered no proof that citizens remain in New York State longer than aliens.

The efficiency and stability argument is ultimately reduced to an argument of economics. The hiring and training of personnel is costly to the state. Even assuming for purposes of argument, that resident aliens are a less stable class than citizens, and no evidence has been introduced to prove this, saving money or limiting expenses is no justification when used to discriminate against aliens.

"We agree with the three-judge court in the Pennsylvania case that the 'justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state.' 321 F. Supp. at 253. See also *Purdy & Fitzpatrick v. California*, 71 Cal. 2d 566, 581-582, 456 P.2d 645, 656 (1969). There can be no 'special public interest' in tax revenues to which aliens have contributed on an equal basis with the residents of the State." *Graham v. Richardson*, *supra* at 376.



The Appellant relies upon *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), for the proposition that the government can establish qualifications for employees that would insure integrity and efficiency of its operations and thereby exclude aliens from employment (Appellant's Brief, pg. 13). In *United Public Workers v. Mitchell*, *supra*, the Court was concerned with off-duty political activities of an employee of the United States, in violation of the Hatch Act. The Court concluded that Congress could regulate employees' political activities and explained:

"Nevertheless, if in free time he [the employee] is engaged in political activity, Congress may have concluded that the activity may promote or retard his advancement of preferment with superiors. Congress may have thought that Government employees are handy elements for leaders in political policy to use in building a political machine. For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." *United Public Workers v. Mitchell*, 330 U.S. 75, 101.

The case at bar does not challenge the regulatory powers of the state government over its employees. The New York statute (§53 subd. 1) discriminates against employment of aliens, not the regulations of employee activities.

The qualifications for employment, including loyalty, must be determined for each individual with appropriate safeguards for protecting the individual's personal liberties.

"In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by

means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, at 488 (1960).

Every state makes extensive inquiry into the character and competence of prospective employees. Most states provide for probationary employment periods before a new employee receives the benefits of tenure and during a probationary period an employee may be discharged who has not met all of the particular state's standards. Finally, even tenured employees may be discharged for cause.

It is undisputed that the Appellees and the class they represent are lawful resident aliens. They have obtained the requisite permission and have been approved for permanent residence by the Immigration and Naturalization Service. The Appellees have met the rigorous security standards of 8 U.S.C. §1182(a) which enumerates the classes of aliens ineligible for admission to United States. Section 1182 generally excludes all persons of criminal, moral and mental turpitude. It also excludes security risks such as anarchists, members of the Communist Party of the United States or advocates of world communism, advocates of the overthrow of the United States Government and generally advocates and members of organizations having doctrines for the establishment of totalitarian dictatorships. 8 U.S.C. §1182(a)(28). The Appellants cannot be presumed to argue that the State of New York requires a higher standard of security.

No showing of any kind has been made that aliens as a class are automatically disloyal. In fact, "... there are no rational grounds for believing that all residents who are not also citizens are ipso facto lacking in loyalty or commitment to abide by the laws of the land." *Raffaelli v. Committee of Bar Examiners*, Cal. 3d , 101 Cal. Rptr. 896, at 903 (1972).

## II.

### NEW YORK CIVIL SERVICE LAW §53 SUBDIVISION 1. CONFLICTS WITH SUPREMACY CLAUSE OF THE CONSTITUTION. THE POWER TO REGULATE ALIENS IS THE EXCLUSIVE POWER OF THE FEDERAL GOVERNMENT AND PRECLUDES THE STATES FROM DISCRIMINATION AGAINST ALIENS IN EMPLOYMENT.

The sole regulation of aliens is invested in the federal government as part of its power to regulate foreign commerce, to conduct foreign relations, to establish a uniform rule of naturalization and the inherent power of any national sovereign to control immigration. See *United States Constitution, Article I, §8 cl. 3*. The federal power to exclude aliens is absolute. *Fong Yue Ting v. U.S.*, 149 U.S. 698, 705-07 (1893); see in general Note, 71 Yale Law Journal 760 (1962). State action pertaining to non-citizens, if not entirely restricted, is sharply limited. A Pennsylvania statute requiring alien registration was struck down as preempting federal authority. *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941).

Congress has laid down a comprehensive regulatory scheme which controls the admission,\* continued residence and naturalization of aliens. *Immigration and Nationality Act of 1952, as amended* 8 U.S.C. Section

*1101 et seq.* Of particular relevance, Congress has enacted legislation concerning the employability of immigrating nationals. Congress has excluded those aliens deemed unemployable, 8 U.S.C. §1182(a). Aliens who are paupers, beggars, vagrants, or are likely to become public charges will not be admitted. 8 U.S.C. §1182(a) 8, 15. Finally, as to those aliens seeking entry for purposes of performing skilled or unskilled labor, a certificate from the Secretary of Labor concerning the availability of work is a prerequisite to admission. 8 U.S.C. §1182(a) 14.

The existence of this comprehensive scheme of federal regulation concerning the employability of aliens precludes any state regulation beyond the intent of Congress:

"Where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purposes of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxiliary regulations." *Hines v. Davidowitz*, *supra*, at 66-67.

A state law which prohibits employment of aliens, aliens who have been admitted by federal officials, only because of their citizenship status clearly conflicts with the federal scheme and is null and void.

"The scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 at 230. (1947).

In *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7 (1915), a state statute which limited the number of aliens who could be employed in private business was struck down:

"The authority to control immigration—to admit or exclude aliens—is vested solely in the federal government. *Fong Yue Ting v. United States*, 149 U.S. 698 . . . The assertion of an authority to deny to aliens the opportunity to earn a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality." *Truax v. Raich*, 239 U.S. 33 at 42 11, quoted in *Takahashi v. Fish and Game Commission*, 334 U.S. 410, at 916 (1948).

Cf. *Oyama v. State of California*, 332 U.S. 633, 649, (Justices Black and Douglas, concurring.)

"Congress has provided strict immigration tests and quotas. It has also enacted laws to regulate aliens after admission into the country. Other statutes provide for deportation of aliens . . . all of this means that Congress, in the exercise of its exclusive power over immigration, *Truax v. Raich* . . . decided that certain Japanese, subject to federal laws, might come and live in any one of the states of the Union. The Supreme Court of California has said that one purpose of that State's Land Law [which prohibited aliens from owning agricultural lands] is to 'discourage the coming of Japanese into this state' . . . California should not be permitted to erect

obstacles designed to prevent the immigration of people whom Congress has authorized to come into and remain in the country."

Compare *Union Colliery v. Bryden*, [1899] A.C. 580 (Can.), holding *ultra vires* a British Columbia statute prohibiting employment of Chinese in the mines, cited in *National Power to Control State Discrimination against Foreign Goods and Persons; A Study in Federalism*, 12 Stan. L. Rev. 355, 369 (1960). But cf. *Heim v. McCall*, 239 U.S. 175 and *Crane v. New York*, 239 U.S. 195 (1915).

Moreover, it is easy to contemplate the direct impact on foreign relations of such discrimination against aliens. Foreign nations, some of whom provide free medical care to United States travelers, must be disturbed by a United States which first welcomes foreign nationals to its shores, requiring them to undergo a rigorous admission procedure, and then inconsistently allows its states to arbitrarily deny them the means to survive.

"Yet, even in absence of a treaty, a State's policy may disturb foreign relations . . . Certainly a State could not deny admission to a traveler from East Germany nor bar its citizens from going there [citations omitted]. If there are to be such restraints, they must be provided by the Federal Government. The present Oregon law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with these problems." *Zschernig v. Miller*, 389 U.S. 419, 441 (1968).

The restriction of §53 of the *New York State Civil Service Law* is certain to interfere with the conduct of foreign relations because it expressly contravenes the



principles of the *United Nations Charter*, 59 Stat. 1031, and the *Charter of the Organization of American States*, 2 UST 2394 (1951). One would be hard pressed, as a representative of the United States, either before a single foreign dignitary or at a meeting of the United Nations or the Organization of American States to justify or explain New York's restriction in light of the declared purpose of the United Nations to "...develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Cf. *Oyama v. State of California*, 332 U.S. 633, 649-650, (Justices Black and Douglas concurring), 673 (Justices Murphy and Rutledge concurring). The principles of the *Organization of American States Charter*, whose "Member States agree upon the desirability of developing their social legislation on the following bases: (a) All human beings, without distinction as to race, nationality, sex, creed or social condition, have the right to attain material well-being and spiritual growth under circumstances of liberty, dignity, equality of opportunity, and economic security." *United Nations Charter, Chapter 1, Article 1 Subparagraph (2)*; *Charter of the Organization of American States, Chapter VII, Article 29*.

The statute is inconsistent not only with federal regulation of non-nationals expressed in our Immigration Laws, but also with the alien protection laws found in our Civil Rights Act of 1866, and formerly codified as part of the Immigration Law under 8 U.S.C. §41:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."



This statute has repeatedly been held applicable to discrimination in employment, see e.g., *Arrington v. Massachusetts' Bay Transp. Auth.*, 306 F. Supp. 1355 (D. Mass., 1969), *Young v. International Telephone and Telegraph Co.*, 438 F.2d 757 (1971) (Third Circuit, 2/11/71), and specifically to discrimination against aliens. *Takahashi v. Fish and Game Commission*, 335 U.S. 410 (1948). Though technically not subject to suit under the 1964 Civil Rights Act, by discriminating against non-nationals, the State of New York is violating the stated public policy of the United States that aliens should not be subjected to discrimination in employment. As such New York has overreached its lawful power. See *Takahashi, supra*.

The United States Supreme Court has recently ruled that states cannot pre-empt the authority of the Federal Government to regulate welfare benefits for aliens and citizens. *Graham v. Richardson*, 403 U.S. 365 (1971). The court did not wish to deal with the power of Congress to enact a nationwide residency requirement for welfare recipients but as to the individual states it stated:

"Under Art. 1, §8, cl. 4 of the Constitution, Congress' power is to 'establish a uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity." *Graham v. Richardson*, 403 U.S. 365, 382 (1971).

The New York Civil Service Law, Section 53, illegally pre-empts the power of the federal government to regulate the employment of aliens.

## III.

**THE EFFECT OF THE DENIAL OF CIVIL SERVICE  
EMPLOYMENT IS TO DENY ALIENS THE RIGHT  
TO ENTER AND RESIDE IN THE STATE IN  
VIOLATION OF THEIR FIRST AND FOURTEENTH  
AMENDMENT RIGHTS.**

Denial of the right to public employment to aliens results in impairing their right to travel. New York State and its subdivisions employ nearly one-half million people. Speculatively, other than the federal government, New York State is the single largest employer in the nation. The Civil Service statute inhibits an alien from considering New York State a place to make one's home. In *United States v. Guest*, 383 U.S. 745, 757-758 the court stated:

"The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."

In *Truax v. Raich*, 239 U.S. 33, the Court stated:

"The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work."

In *Truax*, the Court stated that the practical result of the limitations on employment of aliens would cause aliens to be segregated in those states that would offer them hospitality. This clearly would be an infringement on the right to travel, a right granted by the federal government at the time admission to the United States was offered to aliens.

A Connecticut statute that imposed a time restriction on the right of non-resident indigent persons to receive public assistance was held to effect an impermissible restriction on the right to travel. *Shapiro v. Thompson*, 394 U.S. 618, 634. The Court stated:

"The waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from state to state or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."

In *Grāham v. Richardson*, 403 U.S. 365, 375 (1971) Court referred to *Shapiro*, *supra* and *Guest* in discussing the right to travel and said:

"It is enough to say that the classification involved in *Shapiro* was subjected to strict scrutiny under the compelling state interest test, not because it was based on any suspect criterion such as race, nationality, or alienage, but because it impinged upon the fundamental right of interstate movement."

#### IV.

**THE APPELLANT CANNOT SUPPORT ITS ARGUMENTS OF LOYALTY OR THE NEED FOR STABLE AND EFFICIENT GOVERNMENT ADMINISTRATION BY EXCEEDING THE LEGISLATIVE INTENT EXPRESSED ON THE FACE OF THE STATUTE.**

The Appellant endeavors to establish that New York is not unjustly discriminating against aliens. The belabored arguments of the need for loyal employees who will pursue employment in competitive civil service as a

lifetime career must be reviewed within the context of what the legislature was trying to accomplish by the statute. Appellees maintain that the law was solely intended to deny them their constitutional rights. One possible method of examining the Appellant's argument is to see if it is supported by legislative intention.

The legislative intent concerning an enactment must first be obtained from the words or language of the enactment and the courts may not speculate as to intention beyond the words of the statute. *56 NY Jur., Statutes §113*. When the statute is clear and unambiguous the courts must give a plain effect to its meaning. *56 NY Jur., Statutes § 114*. The words of the statute excluding non-citizens from employment have the clarity of fine crystal. The Appellant endeavors to read meaning and interpretation into the statute which the clarity of the words do not allow.

If the language of a statute is unclear, ambiguous, or if the legislative intention is contrary to the literal meaning of the words the intent of the legislature will prevail. *56 NY Jur., Statutes §123*.

The language of § 53 subdivision 1 is clear and unambiguous. § 53 subdivision was first amended to add the relevant discrimination against aliens, in 1939\*. The "Bill Jacket" maintained by the state legislature at the Capitol in Albany, New York, has been examined in an effort to uncover any legislative intention. The bill jacket did not contain any committee reports, minutes of floor debate or a message from the then Governor Herbert H. Lehman. The bill jacket did contain several memoranda to the Governor and to the Legislative Committee and several letters from interested parties and organizations.

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\*The present statute as amended still contains the same discrimination against aliens originally enacted in 1939.

Some letters and memoranda recommended that the bill\*\* not pass because it would exclude aliens from certain technical positions that could only be filled by them, such as Swedish Masseurs, and because it excluded persons who had filed intentions to become citizens.

The year the provision was first enacted, 1939, was a time when this country was beginning to recover from its most severe economic depression. The country was emerging from a period of political isolation and two and one half years hence the United States would be involuntarily drawn into World War II.

Several letters in the bill jacket, reflect the political and economic climate. One memorandum reads, in part, as follows:\*

"I cannot conceive of any valid objection to incorporating this rule into the law. I would object to a resident bill, perhaps, but not to a citizenship bill. If we cannot find anyone in the whole United States who can qualify for a position, then we must certainly be in a pretty bad fix."

The bill jacket also contained a memorandum from Philip F. Brueck:\*

"The purpose of the merit system is to eliminate political manipulation and appointments by the spoils system. When non-residents and aliens are

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\*\*Referred to as the Babcock Bill, Senate Print No. 2405, Assembly Int. No. 1490.

\*Memorandum for the Governor, dated 6/1/39 and subscribed with the typewritten initials "N.R.S."

\*Undated Memorandum by Philip F. Brueck of the Legislative Committee who from another in the bill jacket, is identified as the Legislative Chairman of the Civil Service Forum.

allowed to become employees of this state, the purpose of non-political appointments is side-tracked, and in its place will be found that non-taxpayers and persons who owe allegiance to countries other than the United States, are employed in positions rightfully belonging to those citizens who have been residents. In a great state such as New York, there will never be a necessity to go outside of the State to bring in men of ability and talent for within this state we have the richest human resources to select from. There seems to be no reason why New York taxpayers should pay the salaries of aliens, especially those from Canada, when in the native countries of these same aliens, not only is it impossible for an American to obtain a civil appointment but it is hardly possible for him to obtain private employment. In the enactment of this measure, a long borne abuse will be stopped. The legislators as representatives of people of the State must recognize the will of the Citizens of the state to confine public employment to citizens who are residents of the state."

§53, subdivision 1 has been enacted without any authoritative expression of legislative intention. Further, its language clearly expresses the only purpose of the statute, to discriminate against an entire class of persons in violation of the United States Constitution. The polemics of several interested individuals, while carrying little weight, merely reflect this purpose.

## CONCLUSION

For the reason stated it is respectfully submitted that the order of the court below should be affirmed.

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\*Attorney for Appellees wishes to acknowledge the assistance of Philip Bertenthal and Carolyn Kubitschek in the preparation of this brief.



LE COPY

FILED

OCT 30 1972

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the  
United States**

**October Term, 1971  
No. 71-1222**

**JULE M. SUGARMAN, Administrator of the New  
York City Human Resources Administration, and  
HARRY I. BRONSTEIN, City Director of Per-  
sonnel and Chairman of the New York City Civil  
Service Commission,**

*Appellants*

**vs.**

**PATRICK McL. DOUGALL, ESPERANZA  
JORGE, TERESA VARGAS, and SYLVIA CAS-  
TRO, individually and on behalf of all others  
similarly situated,**

*Appellees*

*On Appeal From the United States District Court  
for the Southern District of New York.*

**BRIEF OF THE COMMONWEALTH OF  
PENNSYLVANIA AS AMICUS CURIAE**

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STATE OF NEW YORK  
IN SENATE  
January 10, 1901.

REPORT  
OF THE  
COMMISSIONERS OF THE LAND OFFICE  
IN RESPONSE TO A RESOLUTION  
PASSED BY THE SENATE  
MAY 1, 1899.  
ALBANY:  
J. B. LIPPINCOTT & CO. PRINTERS.  
1901.

ALBANY:  
J. B. LIPPINCOTT & CO. PRINTERS.  
1901.

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1901.

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1901.

## QUESTIONS PRESENTED

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1. Whether New York Civil Service Law, §53, denies Appellees, lawfully admitted resident aliens, equal protection of the laws.

2. Whether New York Civil Service Law, §53, interferes with exclusive federal control over immigration and naturalization, in violation of the Supremacy Clause of the United States Constitution.

## INTRODUCTION

Appellees (plaintiffs below) are seeking declaratory and injunctive relief from an allegedly unconstitutional state statute (New York Civil Service Law, §53 (McKinney 1959)), which, with certain exceptions, denies civil service employment to all New York residents who are not citizens of the United States. A three-judge panel found that the statute denies Appellees equal protection of the laws, in violation of the Fourteenth Amendment, and intrudes upon paramount federal control over immigration and naturalization, in violation of the Supremacy Clause. *Dougall v. Sugarman*, 339 F. Supp. 906, 907-08 and 910 (S.D. N.Y. 1971).

Pennsylvania has a statute similar to the one presently under attack: "Persons applying for positions or promotions in the classified service shall be citizens of the United States. . . ." Act of August 5, 1941, P. L. 752, Art. V, §501, as amended, 71 P.S. §741.501 (Supp. 1972-73). The Attorney General of Pennsylvania believes that such a provision is discriminatory and violates the Equal Protection Clause of the Fourteenth Amendment, as well as the Supremacy Clause of the United States Constitution. Accordingly, by an informal opinion letter dated November 23, 1971, the Pennsylvania Civil Service Commission was advised and ordered "not to take any further actions to preclude candidacy of applicants for Civil Service positions on the ground of lack of citizenship."

The bases for the Attorney General's decision were more fully discussed in a subsequent formal opinion is-

sued to the State Board of Veterinary Medical Examiners, advising them that the statutory requirement of citizenship for licensing veterinarians is unconstitutional. *Official Opinion No. 92*, Op. Pa. Atty. Gen. 177 (1971) (Exhibit "A", attached hereto). Although this opinion was limited to veterinarians, its reasoning was followed in other formal opinions with respect to the licensing requirements for other professions. *Official Opinion No. 112*, Op. Pa. Atty. Gen. (March 15, 1972) (real estate brokers) (Exhibit "B", attached hereto); *Official Opinion No. 113*, Op. Pa. Atty. Gen. (March 23, 1972) (physicians) (Exhibit "C", attached hereto); *Official Opinion No. 114*, Op. Pa. Atty. Gen. (March 23, 1972) (pharmacists) (Exhibit "D", attached hereto); *Official Opinion No. 116*, Op. Pa. Atty. Gen. (April 4, 1972) (registered and practical nurses) (Exhibit "E", attached hereto).

The Commonwealth of Pennsylvania, with the consent of all counsel of record, has filed this brief in support of Appellees' position.

SUMMARY OF ARGUMENT

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New York Civil Service Law, §53, bars aliens from securing employment in New York as career civil servants, thus drawing a classification which discriminates against Appellees solely because of their alienage. Appellees are denied the opportunity to work in New York on an equal basis with other residents of the State. The discrimination is "inherently suspect" because it interferes with a basic personal freedom, the right to work, *and* because it classifies on the basis of citizenship, a criterion which has been equated with wealth and race as generally irrelevant to any constitutionally acceptable purpose. The discrimination violates the Equal Protection Clause because it is not *necessary* to promote a *compelling* governmental interest.

New York argues that aliens are inherently disloyal and untrustworthy, so they should not be permitted to hold positions affecting matters of governmental policy. Section 53 is not *necessary* to promote this alleged governmental interest, since the statute bars aliens from the full range of civil service jobs, clerical as well as administrative positions. It is also illogical to conclude that the employment of aliens would subvert the governmental affairs of the State of New York, particularly inasmuch as aliens may be drafted into our armed forces and serve in other federal positions affecting our national security. The argument that employment of aliens as civil servants would disrupt New York's "continuity in" the management of its affairs" is apparently grounded in the belief that aliens are more nomadic than citizens. No statistical



proof has been offered to support this assertion. It defies logic to claim that, *e.g.*, an alien who has lived in New York for ten years is more likely to leave the state than a citizen who has lived in ten *different* states in the past ten years. Length of residence might be relevant in hiring civil servants, but citizenship is not.

Section 53 also infringes upon the federal exercise of power over immigration and naturalization, in violation of the Supremacy Clause of Article VI of the United States Constitution. The New York statute interferes with comprehensive federal legislation governing admission of aliens and their rights and duties while in this country. Section 53 is not necessary to protect any "special public interest" of New York. Moreover, this exception to the Supremacy Clause is no longer applicable in *any* situation, since the bases for the exception have now been rejected by the United States Supreme Court.

## ARGUMENT

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### I.

**NEW YORK CIVIL SERVICE LAW, §53, DENIES APPELLEES, LAWFULLY ADMITTED RESIDENT ALIENS, EQUAL PROTECTION OF THE LAWS**

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#### **A. New York Must Prove That Section 53 Is Necessary To Promote a Compelling Governmental Interest**

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"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, §1. This constitutional guarantee is applicable to all persons lawfully abiding in the United States, including aliens. *Takahashi v. Fish and Game Comm'n.*, 334 U.S. 410, 420 (1947); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Under the "traditional" equal protection test, a state's classification is permissible unless it is "without any reasonable basis." *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969). The classification must bear some rational relationship to a legitimate state end. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Baxstrom v. Herold*, 383 U.S. 707 (1966). It must not be arbitrary or invidious. *Avery v. Midland County*, 390 U.S. 474 (1968). The instant case, however, requires application of much more stringent guidelines than the "traditional" test, under either of two lines of cases.

First, a classification which infringes upon free exercise of a basic personal freedom, "unless shown to be

necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel). Accord, *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *NAACP v. Alabama*, 357 U.S. 449 (1958) (right of association); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (right to acquire, enjoy, own and dispose of property). The "compelling governmental interest" test is applicable to classifications which affect fundamental rights, irrespective of whether such rights are explicitly guaranteed under the Constitution. *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969). An alien's fundamental right to work cannot be denied unless that denial is not *necessary* to secure a *compelling* governmental interest.

"It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Citing cases.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

Section 53 of the New York Civil Service Law bars aliens from securing career employment as civil servants, one of the *most* common occupations in today's society. A person who has been deprived of the opportunity for employment has been "condemned to suffer grievous loss". *Joint Anti-Fascist Refugee Committee v. McGrath*, 340 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Because Section 53 deprives aliens of a fundamental constitutional right, New York must establish that it has a

*compelling* interest in barring aliens from civil service employment and that the classification as drawn is *necessary* to secure that interest.

The "compelling governmental interest" test is also applicable to this case because Section 53 draws a classification based on citizenship. Certain types of classifications, such as those based on citizenship, wealth or race, are inherently suspect and carry a burden of justification which is much heavier than the "traditional" test. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969); *Goss v. Board of Education*, 373 U.S. 683 (1963). Because they are generally irrelevant to any constitutionally acceptable purpose, such classifications are subject to the *most* rigid judicial scrutiny and will be upheld only if *necessary* to secure a *compelling* state interest. *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). This test is as applicable to classifications based on citizenship as to those based on wealth or race.

"Under traditional equal protection principles, a State retains broad discretion to classify as long as its classification has a reasonable basis . . . *classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.* Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate. Accordingly, it was said in *Takahashi*, 334 U.S., at 420, 68 S. Ct., at 1143, that 'the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.'" *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971). (Emphasis added.)

In *Graham*, Pennsylvania's statutory denial of welfare benefits to resident aliens was overturned for lack of a *compelling* justification. 403 U.S. at 375. Because the New York statute also employs the inherently suspect criterion of alienage, *as well as* because the statute infringes upon a fundamental personal right, it must fall unless proven to be *necessary* to secure a *compelling* state interest.

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**B. The Justifications Offered To Support New York Civil Service Law, §53, Are Inadequate To Show a Compelling Governmental Interest**

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New York has not only failed to prove that Section 53 is *necessary* to promote a *compelling* governmental interest, but careful examination of the reasons offered to justify Section 53 shows that the classification is also "without any reasonable basis". The denial of civil service employment to aliens cannot be upheld under the application of either the "traditional" equal protection test or the more stringent "compelling governmental interest" test which is applicable in this case.

Appellants first argue that aliens are properly denied employment because a civil servant "participates directly in the formulation and execution of government policy and thus must be free of obligations, including those to a foreign state, which might impair the exercise of his judgment or jeopardize public confidence in his objectivity." *Brief for Attorney General of the State of New York*, at p. 23 (hereinafter "*Brief for N.Y.*"). However, Section 53 is *not* confined to civil servants who "participate directly in the formulation and execution of government

policy". In point of fact, although one of the named appellees was an administrative assistant, Sylvia Castro was employed as a *technician* and Esperanza Jorge and Teresa Vargas were *clerk-typists*. Assuming, *arguendo*, that aliens should be barred from policy-making positions because they cannot be trusted, this is no reason to bar aliens from *clerk-typist* positions, or from any other civil service jobs which do not call for the worker to make policy decisions. Without conceding that a more narrowly drawn statute would be permissible, it is not necessary to exclude aliens from *all* career civil service employment merely to prevent aliens from serving in the few genuinely sensitive positions.

Moreover, New York has offered no proof to support the anachronistic notion that aliens as a class are untrustworthy or incapable of exercising good judgment. A character and fitness inquiry might be appropriate under some circumstances, but the blanket banning of aliens cannot substitute for such a narrow inquiry. Congress has determined that permanent resident aliens, such as Appellees in the case at bar, are trustworthy enough to enlist in our armed forces and to rise as high in rank as their abilities and ambition dictate. 10 U.S.C.A. §§591 (b) (1), 3253(c) (1959), as amended (Supp. 1972). They are also fully subject to conscription under the Selective Service Act. 50 U.S.C. App. §§453, 454 (1968), as amended (Supp. 1972); 32 C.F.R. §§1611.1, 1611.2(b) (1972); *Astrup v. Immigration and Naturalization Service*, 402 U.S. 509 (1971). The exclusion of qualified applicants from career civil service positions, solely by reason of their alienage, bears no *rational relationship* to the goal of insuring that government workers are competent or free from conflicts of interests and it

clearly is not *necessary* to the promotion of that goal. See, *Raffaelli v. Committee of Bar Examiners*, 101 Cal. Rptr. 896, 496 P. 2d 1264, 1269-70 (1972).

New York further argues that aliens are necessarily disloyal and cannot honestly swear or affirm to "support the Constitution of the United States and the Constitution of the State of New York", as required by the New York Civil Service Law. *Brief for N.Y.*, at p. 24. There is, of course, no legal or practical reason why an alien cannot take such an oath. Aliens who enlist in the armed forces regularly take a much more explicit oath than required by New York. 10 U.S.C.A. §502 (Supp. 1972). The United States Congress is thus willing to place matters of national security in the hands of persons who are ineligible to work as clerk-typists for the City of New York. Aliens may serve with our armed forces, the Department of Defense, the Atomic Energy Commission, the Department of State and the United States Information Agency. It is no more rational to assume that non-citizens cannot be loyal to this country, or to the State of New York, than it is to assume that citizens cannot be *disloyal*. The mark of a person's integrity cannot be measured by his citizenship. New York's assertion to the contrary is without support in law, fact or reason.

New York also claims that the employment of aliens as career civil servants would hinder the State's "continuity in the management of its affairs" (*Brief for N. Y.*, at p. 26), because "the alien is subject to deportation and expulsion as well as conscription by the country of his nationality. . . ." *Id.* at p. 27. Aliens may, indeed, be deported or expelled for certain offenses, just as any alien or citizen may be arrested or imprisoned for the commission of a crime. New York's underlying argument ap-



pears to be that a non-citizen is more likely to be deported than a citizen is likely to be arrested. The implication that aliens necessarily are of low moral fiber cannot be given judicial sanction. New York's assertion that aliens are subject to conscription by their own country cannot justify Section 53, since the statute draws no distinction between aliens from those countries which do have conscription and those which do not. Further, all male citizens of this country are subject to conscription, yet *they* are not barred from civil service employment by New York. The fact that a person may be drafted cannot justify this discrimination against aliens. Lastly, New York has offered no proof that aliens are necessarily more nomadic than citizens and it defies logic to claim that, *e.g.*, a permanent resident alien who has lived in New York for ten years is more likely to move out-of-state than a citizen who has lived in ten *different* states in the past ten years. Without factual or logical support, this argument must fail.

The citizenship requirement discriminates unjustifiably and is inimical to the quintessential right of all persons to equality of opportunity under our laws. See Civil Rights Act of 1871, 42 U.S.C.A. §1981 (1970). It protects no valid interest of the State of New York. It does nothing to further the public welfare. It is not related to any valid employment criteria. It does not result in securing better civil service employees. As an attempt to prevent competition, it is clearly invalid. *Truax v. Raich*, 239 U.S. 33 (1915). As an attempt to protect the public, which is the only permissible justification, it is still invalid. The safeguards of educational standards and, where appropriate, a character and fitness investigation can adequately and directly serve this purpose. Citizen-

ship is irrelevant to any legitimate purpose of the New York Civil Service Law.

## II.

NEW YORK CIVIL SERVICE LAW, §53, INTERFERES WITH EXCLUSIVE FEDERAL CONTROL OVER IMMIGRATION AND NATURALIZATION, IN VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION

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The Constitution and laws of the United States are the supreme law of the land, binding upon the individual states. *U. S. Const.*, Art. VI, §2. The states may not pass legislation with respect to aliens, since this is "an area constitutionally entrusted to the Federal Government." *Graham v. Richardson*, 403 U.S. 365, 378 (1971). Accord, *Hines v. Davidowitz*, 312 U.S. 52 (1941).

"The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. *Fong Yue Ting v. United States*, 149 U.S. 698, 713. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer their hospitality." *Truax v. Raich*, 239 U.S. 33, 42 (1915).

Congress has fully preempted the field of aliens and immigration with the comprehensive Immigration and

Nationality Act, 8 U.S.C.A. §§1101-1503 (1970). The Act contains thorough and specific guidelines governing the admission of aliens, as well as their rights and duties while in this country. Section 53 of the New York Civil Service Law infringes upon this pervasive legislation and, therefore, is an unconstitutional violation of the Supremacy Clause of the United States Constitution.

State discrimination against aliens has been allowed only where the legislation was necessary to protect a "special public interest". *Truax v. Raich*, 239 U.S. 33, 42-43 (1915). This exception was explained in *Takahashi v. Fish and Game Comm'n.*, 334 U.S. 410, 416-17 (1948), where the Court found no "special public interest" to justify California's discrimination against alien fishermen. As indicated by the discussion in the immediately preceding Section of this brief, New York does not have a "special public interest" in denying civil service employment to aliens. Moreover, irrespective of the facts in this case, the "special public interest" doctrine is no longer a viable basis for carving out exceptions to the Supremacy Clause.

The doctrine has been used to justify approval of discriminatory state legislation to (1) confine the enjoyment of a state's natural resources to citizens and (2) bar aliens from owning real estate. *Graham v. Richardson*, 403 U.S. 365, 373 nn. 7-9 (1971); *Truax v. Raich*, 239 U.S. 33, 39-40 (1915). However, the cases cited in *Graham* and *Truax* must be firmly limited to their facts, in view of the more humane attitude expressed in subsequent cases. E.g., *Graham v. Richardson*, 403 U.S. 365, 376 (1971) (public revenue); *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1968) (state services); *Takahashi v. Fish and Game Comm'n.*, 334 U.S. 410, 420-21 (1948)

(natural resources); *Oyama v. California*, 332 U.S. 633, 647-74 (1948) (plurality of concurring opinions) (real estate). See *Shelley v. Kraemer*, 334 U.S. 1 (1948). Since the precedent upon which it was based has been effectively excised, the doctrine itself should no longer be applied.

As discussed in *Graham v. Richardson*, 403 U.S. 365, 373-74 (1971), the theory which supported the "special public interest" doctrine was that governmental benefits are "a privilege, rather than a right, [which] may be made dependent upon citizenship." *People v. Crane*, 214 N.Y. 154, 161, 108 N.E. 427, 430 (1915), aff'd, 239 U.S. 195 (1915). "But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham v. Richardson*, 403 U.S. at 374. Both the cases and the theory which formerly supported the doctrine have been rejected, so the doubt which was cast upon its validity by *Takahashi* has been cleared and the doctrine itself is no longer valid. The Supremacy Clause must be applied without exception, thereby barring New York's attempt to legislate where Congress has already acted.

**CONCLUSION**

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For the reasons set forth above, the judgment of the United States District Court for the Southern District of New York should be affirmed.

Respectfully submitted,

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## EXHIBIT "A"

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OFFICIAL OPINION NO. 92

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*Veterinarians—State Board of Veterinary Medical Examiners—Licensing of noncitizens.*

1. Citizenship requirement in Section 3(c) of the Veterinary Law, 63 P.S. §506-3(c) is unconstitutional and the State Board of Veterinary Medical Examiners is instructed to issue a license to practice veterinary medicine to applicants who meet all other requirements except citizenship.

2. Basis of this decision is the 14th Amendment to the United States Constitution which applies not only to citizens of the United States but to aliens as well.

3. A state may classify on the basis of citizenship, but each classification must be reasonable and are inherently suspect and subject to close scrutiny.

4. If a state may not withhold from aliens its tax revenues for welfare; public works, and civil service expenditures, nor its resources from lawful exploitations, and it may certainly not deny to an alien the right to practice his lawful profession for which he is otherwise well qualified.

5. The citizenship requirement is an unjustifiable discrimination, for it protects no valid interest of the Commonwealth.



Harrisburg, Pa.  
December 17, 1971

Charles J. Hollister, D.V.M.  
Secretary  
State Board of Veterinary Medical Examiners  
279 Boas Street  
Harrisburg, Pennsylvania

Dear Dr. Hollister:

You have requested our advice as to whether your Board may license to practice veterinary medicine an applicant who meets all the requirements of The Veterinary Law of April 27, 1945, P. L. 321, 63 P.S. §506, except for the citizenship requirement in Section 3 of the Law, 63 P.S. §506-3(c), which requires that a licensee be "a citizen of the United States." Your Board has advised my Deputy that it knows of no reason inherent in the practice of Veterinary Medicine in this Commonwealth why a practitioner should need to be a citizen of the United States, and that the particular applicant meets all the other requirements of licensure.

It is our opinion and you are so advised that the citizenship requirement in Section 3(c) of the Law is unconstitutional and you are therefore instructed to issue a license to practice veterinary medicine to the particular applicant and to any other non-citizen applicants who meet all other requirements.

In view of the significance of this decision not only to The Veterinary Law, but to other statutes of the Commonwealth requiring citizenship, we are setting forth at some length the basis of our decision. At this time, we are ruling only on the citizenship requirement in The Veterinary Law and are doing so expeditiously so that the

license may be issued forthwith. We expect to deal with other similar restrictions in subsequent opinions as the issues are brought to our attention.

In brief, the basis for our decision is the Fourteenth Amendment to the United States Constitution which provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws*." (Emphasis added.)

It has long been held that the above-quoted Equal Protection Clause applies not only to citizens of the United States, but to aliens as well. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). This does not mean that a state may not classify on the basis of citizenship, but that such classifications must be reasonable and when based on alienage, they "are inherently suspect and subject to close scrutiny." *Graham v. Richardson*, 403 U.S. 365, 372 (1970).

Thus, in *Truax v. Raich*, 239 U.S. 33 (1915), the Supreme Court held unconstitutional an Arizona law which required employers of more than five workers to employ at least eighty per-cent qualified electors or native born citizens on the ground that it violated the rights of aliens to equal protection. The Court stated that the broad range of legislative discretionary power to classify "does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." 239 U.S. at 41. The Court continued that the right to work in the common occupations "is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." *Id.* The fact that the law allowed a twenty percent quota of aliens did not

save it because the State had no right at all to enact any restraint in the area.

The next landmark case on the subject is *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948). That case involved a California law which restricted commercial fishing licenses to persons who were citizens or eligible for citizenship. This meant that Japanese citizens, who were not eligible for United States citizenship, were prohibited from obtaining such licenses. California justified the law on the ground that fish were a natural resource of the state which it had the right to protect and that it had made a reasonable classification in denying the privilege of fishing to aliens. The Court struck down the law as unconstitutional holding (334 U.S. at 420):

"The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

In *Purdy & Fitzpatrick v. State*, 79 Cal. Rptr. 77, 456 P. 2d 645 (1969), the Supreme Court of California struck down a law prohibiting the employment of aliens on public works as arbitrarily discriminatory under the Fourteenth Amendment. It specifically rejected an argument that the state has the right to protect its own citizens from competition from aliens, even where the disbursement of public funds is involved. The objective of favoring citizens of the United States is not a valid compelling state interest which permits such discrimination.

The most recent Supreme Court decision on the subject is *Graham v. Richardson*, 403 U.S. 365 (1970) which

struck down statutes (including the Pennsylvania statute) denying welfare benefits to aliens. The Court construed *Takahashi* as casting doubt on the continuing validity of the special state interest doctrine in all contexts. It held that the justification of limiting costs to the state invalid and unreasonable. As to the issue of whether welfare is a privilege rather than a right, and thus not subject to the same protection, it dismissed the issue reaffirming earlier holdings that constitutional determinations no longer turn on this distinction. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963).

Finally, we note the very recent case of *Dougall v. Sugarman*, 330 F. Supp. 265 (S.D. N.Y. 1971) holding invalid a New York law prohibiting aliens from civil service positions. The justifications raised to support constitutionality—loyalty and efficiency—were rejected. The Court also rejected the argument that citizens were more likely to remain in the civil service as career employees, thus saving the cost of retraining, and held that even if this were so, it could not justify the discrimination in face of the Fourteenth Amendment.

Despite these cases, there still remain many statutes in all states imposing restrictions upon aliens. These have been justified by the proprietary interest and police power of the state, but they are clearly based on a prejudicial mistrust of aliens and a desire to protect citizens from competition. This can be seen from a review of one decision which did strike down such a restriction. In *State v. Ellis*, 184 P. 2d 860 (Ore. 1947), the Court held that a citizenship requirement to be a barber was unconstitutional, following an earlier Michigan case which had ruled similarly. *Templar v. State Board of Examiners*, 131

Mich. 254, 90 N.W. 1058 (1902). The significance of *Ellis*, however, is not so much what it did (in view of the *Takahashi* decision), but the distinction it attempted to make from older decisions holding citizenship requirements to be constitutional. It distinguished cases preventing aliens from engaging in occupations subject to possible abuses or attended by harmful tendencies, such as pool rooms or peddlers, *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927); *Comm. v. Hana*, 81 N.E. 149 (Mass. 1907); or involving public safety, such as pharmacists or lightning rod salesmen, *Sashihara v. State Board of Pharmacy*, 46 P. 2d 804 (Cal. 1935); *State v. Stevens*, 99 Atl. 723 (N.H. 1916). Rather than noting the rejection of the rationales in those cases, the Court in *Ellis* continued to reflect a prejudice to aliens which is inimical to the Fourteenth Amendment by attempting to distinguish those cases.

The validity of any of the justifications and of the cited cases was, however, cast into doubt even before the Court's statement in *Graham v. Richardson*, 403 U.S. at 374-376, in an excellent Note, "Constitutionality of Restriction on Aliens' Right to Work," 57 Colum. L. Rev. 1012 (1957). The authors of the Note observed that exclusions from the professions continue even though some changes have been brought about in other areas such as barbers. They conclude that no justification in the professional area exists:

"The connection between citizenship and medical competency, for example, is not at all clear. Although the rationalization of such statutes is the inferiority of foreign education or the inability to accurately check an alien's qualifications, there has

been no convincing show of reasonableness in such legislation since standards adequate to protect the public could be set up for the admission of foreign physicians." *Id.* at 1026.

We note, parenthetically, that not even that justification exists in the current case where the applicant has been trained at the only, and, perforce, the best school of veterinary medicine in the Commonwealth of Pennsylvania, has passed the examination, and complied with the other prerequisites for licensure.

Under the recent cases, the citizenship requirement in The Veterinary Law cannot stand. Though none of the cases deal with this specific question, in our opinion they mandate this decision *a fortiori*. If a state may not withhold from aliens its tax revenues for welfare (*Graham v. Richardson*), public works (*Purdy & Fitzpatrick*), and civil services expenditures (*Dougall v. Sugarman*), nor its resources from lawful exploitation (*Takahashi*), then it may certainly not deny to an alien the right to practice his lawful profession for which he is otherwise qualified.

The citizenship requirements discriminates unjustifiably. It protects no valid interest of this Commonwealth. It does nothing to further the public welfare. It is not related to any valid licensing requirement. It does not result in better veterinary standards. As an attempt to prevent competition it is clearly invalid. As an attempt to protect the public, which is the only real justification, it is still invalid. The safeguards of education and examination are sufficient to cover this valid policy. Citizenship adds nothing. The mere fact that the state may legitimately regulate licensure does not mean that it may do so on the basis of improper classification.



It should also be pointed out that lack of citizenship is no bar to service in the Armed Forces of the United States Government. The Selective Service Law provides that male aliens entering the United States must register for the draft (32 CFR §1611 et seq.) and it is common for alien doctors to be drafted for medical service with the Armed Forces. Under such circumstances, it would be anomalous, to say the least, to require that doctors who treat horses must be citizens, but doctors who treat men need not.

Although the above is sufficient to lay the basis of our decision, we note that the cases have also relied on the supremacy of federal action involving aliens. In other words, Congress under the authority of the U. S. Constitution (Article I, Section 8), has relegated to itself the regulation of aliens through the enactment of comprehensive immigration laws. 8 U.S.C. §1101 et seq. Federal law, therefore, determines who will be allowed a visa to work in this country. Indeed, preference is given to "qualified immigrants who are members of the professions." 8 U.S.C. §1153(a) (3). In addition, federal law determines employment desiderata. 8 U.S.C. §1184. In light of the federal occupation of the area of the law, state restrictions on ability to obtain certain types of employment and welfare have been stricken down on the additional ground that such restrictions improperly interfere with the federal power. "State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." *Takahashi v. Fish and Game Commission*. 334 U.S. 410, 419 (1947). See also *Graham v. Richardson*, 403 U.S. 365, 377-379 (1971);



**Truax v. Raich**, 239 U.S. 33 (1915); **Purdy & Fitzpatrick v. State**, 456 P. 2d 645, 649-653 (1969); 42 U.S.C. §§1981-1983.

Sincerely yours,

**J. Shane Creamer,**  
**Attorney General.**

EXHIBIT "B"

OPINIONS OF THE ATTORNEY GENERAL

OFFICIAL OPINION NO. 112

*Real Estate Brokers—Salesman—Citizenship*

1. Sections 6(b) and 7(c) of the Real Estate Brokers License Act, 63 P.S. §§436(b), 437(c) are unconstitutional in imposing a citizenship requirement for licensure which violates the Equal Protection Clause of the United States Constitution.

2. Opinion to State Board of Veterinary Medical Examiners of December 17, 1971, followed.

Harrisburg, Pa. 17120

March 15, 1972

Mr. Samuel B. Saxton, Chairman  
State Real Estate Commission  
Room 300, 279 Boas Street  
Harrisburg, Pennsylvania

Dear Mr. Saxton:

You have requested our opinion as to whether an individual who otherwise meets the requirements of Section 7(c) of the Real Estate Brokers License Act, 63 P.S. §437(c), may be refused the right to take the Real Estate Salesman's Examination merely because he is not a citizen of the United States. That Section specifically states:

*Exhibit "B"*

"No person may be licensed by the department as a real estate salesman, unless such person is a citizen of the United States."

Additionally, Section 6(b) of the Act, 63 P.S. §436 (b) states that no person may be licensed as a real estate broker unless such person "... (2) is a citizen of the United States. ..."

It is our opinion, and you are so advised, that both of the above Sections are unconstitutional and unenforceable on the basis of our opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, a copy of which you have received.

Accordingly, with respect to the specific applicant and all future applicants, citizenship, which plays no part in the ability of a person to serve properly as a licensee, may no longer be a requirement.

Sincerely,

Gerald Gornish

Gerald Gornish

*Deputy Attorney General*

(s) JSC

J. Shane Creamer

*Attorney General*

EXHIBIT "C"

OFFICE OF THE ATTORNEY GENERAL

OPINION NO. 113

*Physicians—Medical Practice Act—Citizenship*

1. Section 5 of the Medical Practice Act, 63 P.S. §405 is unconstitutional insofar as it imposes a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the equal protection clause in the United States Constitution.

2. Opinion to State Board of Veterinary Medical Examiners of December 17, 1971, followed.

Harrisburg, Pa. 17120

March 23, 1972

Honorable Vincent J. Fumo  
Acting-Commissioner  
Bureau of Professional & Occupational Affairs  
279 Boas Street  
Harrisburg, Pennsylvania

Dear Mr. Fumo:

You have requested our opinion as to whether an individual who otherwise meets the requirements of the Medical Practice Act of June 3, 1911, P. L. 639, as amend-

ed, 63 P.S. §401 et seq., for licensure, may be denied such licensure merely because he is not a citizen of the United States.

Section 5 of the Act, 63 P.S. §405, provides in pertinent part:

"Each applicant for licensure under the provisions of this act shall furnish, prior to any examination by the said Board, satisfactory proof that he is a citizen of the United States or has declared his intention of becoming a citizen. . .

\* \* \* \* \*

"Applicants from countries foreign to the territory of the United States, who desire to be licensed by said Board, . . . shall present a certificate of United States citizenship or a declaration of intention. . . . The license of any licensee who fulfils the requirements of this act relating to citizenship by presenting a declaration of intention of becoming a citizen, shall be automatically revoked by the Board if such licensee does not present a certificate of United States citizenship to the Board within seven years after original licensure."

It is our opinion, and you are so advised, that the above requirements are unconstitutional and unenforceable on the basis of our opinion to the State Board of Veterinary Medical Examiners, of December 17, 1971, a copy of which you have received. The above-quoted provision, by denying licensure to an individual who does not take steps to become a citizen, or who cannot qualify to become a citizen, denies that individual equal protection of the laws within the meaning of the Fourteenth Amendment to the United States Constitution.

The conclusion we have reached, it may be observed, is even more compelling in this instance than it was in our opinion of December 17, 1971. The Medical Practice Act does not even pretend that there is a compelling state interest in requiring citizenship as a prerequisite for licensure to practice medicine and surgery, since it allows non-citizens to practice up to seven years in this status. It is, therefore, clear beyond doubt that the citizenship requirement is not a necessary or proper qualification prerequisite for licensure, but that it deprives non-citizens of equal protection for no reason. Accordingly, it is unconstitutional and unenforceable.

Finally, we note that this restriction has not served the public interest. As you have stated, and as we have learned from the recent reports by the State Department of Health and the Pennsylvania Medical Society, there is a serious dearth of licensed physicians in Pennsylvania. The removal of this unconstitutional citizenship restriction may, thus, it is hoped, help alleviate this situation and lead to improved health care for the citizens of this Commonwealth.

Sincerely yours,

Gerald Gornish

Gerald Gornish

*Deputy Attorney General*

(s) JSC

J. Shane Creamer

*Attorney General*

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EXHIBIT "D"

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OFFICE OF THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 114

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*Pharmacy Board—Citizenship—Licensure—Age Requirement*

1. Section 3(a) (1) of the Pharmacy Act, 63 P.S. §390-3(a) (1) is unconstitutional in imposing a citizenship requirement for licensure which violates the Equal Protection Clause of the United States Constitution.

2. Opinion to State Board of Veterinary Medical Examiners of December 17, 1971, followed.

3. Requirement in Section 3(a) (1) of the Pharmacy Act, 63 P.S. §390-3(a) (1), that a pharmacist be not less than twenty-one (21) years old is effective and binding.

4. Where the American Council of Pharmaceutical Education or its successor has failed to accredit a foreign school or college of pharmacy, under Section 3(a) (3) of the Pharmacy Act, 63 P.S. §390-3(a) (3), the State Board of Pharmacy is authorized to make its own independent determination as to whether the school or college meets the standards generally required of accredited schools.



Harrisburg, Pa. 17120

March 23, 1972

Mr. Sol. S. Turnoff, Chairman  
State Board of Pharmacy  
279 Boas Street  
Harrisburg, Pennsylvania

Dear Mr. Turnoff:

You have requested our opinion on whether the twenty-one (21) year age and United States citizenship requirements of Section 3(a)(1) of the Pharmacy Act, 63 P.S. §390-3(a)(1) remain in effect and must be adhered to in carrying out its licensing function.

The statutory requirement that a pharmacist be not less than twenty-one years old is effective and binding. You have called to our attention, the fact that there has been an amendment to Section 701 of the Pennsylvania Election Code, 25 P.S. §2811, allowing eighteen (18) year olds to vote (Act No. 29 of 1971). We may also note Amendment XXVI to the Constitution of the United States, which similarly lowers the voting age to eighteen (18) years of age or older. These amendments, however, are limited to and do not extend beyond the right to vote. There have been several other bills recently introduced in the Legislature reducing age requirements, all of which are similarly limited to certain areas. Two of these bills would lower the age of pharmacists (Senate Bill No. 62 of 1971; House Bill No. 1674 of 1971), but neither has passed even one house of the Legislature. In our opinion, the legislative restriction of licensure to twenty-one (21) years of age and over is a reasonable determination by the Legislature regarding practice of pharmacy, which is a profession requiring maturity and care. The require-

ment is thus constitutional and enforceable. See *George v. United States*, 196 F. 2d 445 (9th Cir. 1952), *cert. denied*, 344 U.S. 843 (1952).

With respect to your question regarding citizenship, it is our opinion and you are so advised, that this requirement is unconstitutional and unenforceable based on our opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, a copy of which you have received, for the reason that it deprives non-citizens of equal protection of laws within the meaning of the Fourteenth Amendment of the Constitution of the United States. Citizenship is not a valid criterion in determining whether an individual is qualified to receive a pharmacist's license.

We note finally, that Section 3(a) (3) of the Pharmacy Act, 63 P.S. §390-3(a) (3), requires every pharmacist to hold a "degree in pharmacy granted by a school or college of pharmacy which is accredited by the American Council of Pharmaceutical Education, or its successor." It is our understanding that the Council does not accredit foreign pharmacy schools. Therefore, in some of the applications before your Board, the applicants may not hold a degree in pharmacy from such an accredited school or college of pharmacy. We hold some doubts regarding the propriety of the method of accreditation, since it may be an improper delegation of legislative authority. However, in keeping with the rules of statutory construction, we need not decide the issue, so long as you may exercise your duties properly in any event. Section 52(3) of the Statutory Construction Act of May 28, 1937, 46 P.S. §552 (3); *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 575-585 (1947); *Robinson Township School*

*District v. Houghton*, 387 Pa. 236 (1956). Accordingly, should this requirement present a problem in any case, we suggest that you request the Council's advice regarding accreditation, and if none exists because the Council has not investigated the institution, it is our opinion, and you are so advised, that you may make your own independent determination as to whether the school or college meets the standards generally required of the accredited schools which you do recognize.

Sincerely yours,

Gerald Gornish

Gerald Gornish

*Deputy Attorney General*

(s) JSC

J. Shane Creamer

*Attorney General*

## EXHIBIT "E"

## OFFICE OF THE ATTORNEY GENERAL

## OFFICIAL OPINION NO. 116

*Registered Nurses — Practical Nurses — Citizenship Requirement—Licensure*

1. Sections 6 and 14(9) of the Professional Nursing Law of May 22, 1951, 63 P.S. §211 et seq., are unconstitutional insofar as they impose a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the protection clause in the United States Constitution.

2. Sections 5 and 16(9) of the Practical Nurse Law of March 2, 1956, 63 P.S. §651 et seq., are unconstitutional insofar as they impose a citizenship requirement for licensure and insofar as it revokes licensure to an individual who has filed a declaration of intent, but fails to become a citizen within seven years thereafter. These requirements violate the protection clause in the United States Constitution.

3. Opinion to the State Board of Veterinary Medical Examiners of December 17, 1971, & Opinion No. 113 followed.

Harrisburg, Pa. 17120  
April 4, 1972

Honorable Vincent J. Fumo  
Acting Commissioner  
Professional & Occupational Affairs  
279 Boas Street  
Harrisburg, Pennsylvania

Dear Mr. Fumo:

You have requested our opinion as to whether individuals who otherwise meet the requirements of licensure under The Professional Nursing Law of May 22, 1951, 63 P.S. §211 et seq., and the Practical Nurse Law of March 2, 1956, 63 P.S. §651 et seq., may be denied such licensure for the sole reason that they are not citizens of the United States.

Both of these laws require citizenship. Section 6 of The Professional Nursing Law, as amended, 63 P.S. §216, provides that:

"Every applicant, to be eligible for examination for licensure as a registered nurse, shall furnish evidence satisfactory to the Board that he or she is a citizen of the United States or has legally declared an intention to become such. . . ."

Section 14(9) of the Law, 63 P.S. §224(9) further provides:

"The Board may suspend or revoke any license in any case where the Board shall find that—

\* \* \* \* \*

(9) The licensee having obtained a license upon declaration of intention to become a citizen of the United States, has not become a citizen of the United

States within seven (7) years after the date of such declaration of intention."

The Practical Nurse Law contains similar requirements. Section 5 of the Law, as amended, 63 P.S. §655 provides:

"Every applicant for examination as a licensed practical nurse shall furnish evidence satisfactory to the board that he or she . . . is a citizen of the United States or has legally declared intention to become such. . . ."

Section 16(9) of the Law, 63 P.S. §666(9) further provides:

"The Board may suspend or revoke any license in any case where the Board shall find . . .

\* \* \* \* \*

(9) That said licensee having obtained a license or certificate of record upon declaration of intention to become a citizen of the United States has not become a citizen of the United States within seven (7) years from the date of such declaration of intention."

For the reasons set forth in our opinion to the State Board of Veterinary Medical Examiners, dated December 17, 1971, a copy of which you have received, as further amplified in our Opinion No. 113 regarding the Medical Practice Act, the above requirements are unconstitutional and unenforceable. The requirements in both of the laws here in question are similar to those we declared invalid in Section 5 of the Medical Practice Act, 63 P.S. §405; the reasons for finding these requirements unenforceable are similarly compelling in this case. Accordingly, you

should advise and offer licensure to any non-citizen who is within or beyond the seven (7) year period.

We make two further observations. First, having been advised that there is a great shortage of qualified licensed nurses in the Commonwealth of Pennsylvania, we are gratified to know that the removal of this unconstitutional requirement will result in a direct and immediate benefit to the public. Second, we note that since our comprehensive opinion of December 17, 1971, the United States Court of Appeals for the Third Circuit (which includes Pennsylvania) has ruled, in a similar context, that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution prohibits the Virgin Islands from requiring citizenship as a prerequisite to participation in a territorial scholarship fund. *Chapman v. Gerard*, 40 U.S. Law Week, 2565 (1972). Our analysis in this and other recent opinions on the same subject is thus confirmed by the highest federal court having immediate jurisdiction over Pennsylvania.

Sincerely yours,

Gerald Gornish

Gerald Gornish

*Deputy Attorney General*

(s) JSC

J. Shane Creamer

*Attorney General*



JAN 4 1973

MICHAEL RODAK, JR., CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1971

No. 71-1222

JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK MC L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

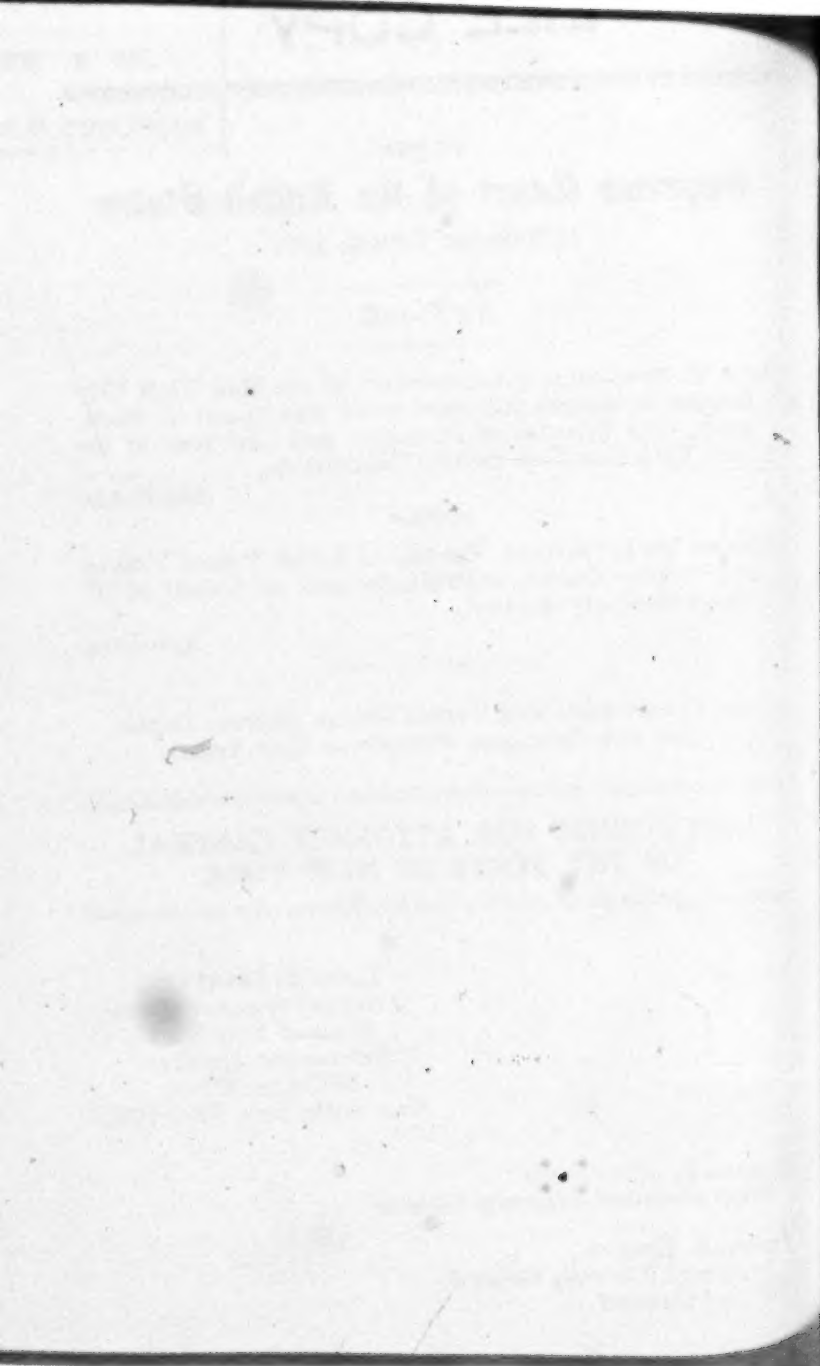
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR ATTORNEY GENERAL  
OF THE STATE OF NEW YORK**

LOUIS J. LEFKOWITZ  
Attorney General of the  
State of New York  
*Intervenor-Appellant*  
80 Centre Street  
New York, New York 10013

SAMUEL A. HIRSHOWITZ  
First Assistant Attorney General

JUDITH A. GORDON  
Assistant Attorney General  
*of Counsel*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1971

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No. 71-1222

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JULE M. SUGARMAN, Administrator of the New York City  
Human Resources Administration and HARRY I. BRON-  
STEIN, City Director of Personnel and Chairman of the  
New York City Civil Service Commission,

*Appellants,*

*against*

PATRICK MC L. DOUGALL, ESPERANZA JORGE, TERESA VARGAS,  
and SYLVIA CASTRO, individually and on behalf of all  
others similarly situated,

*Appellees.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

**REPLY BRIEF FOR ATTORNEY GENERAL  
OF THE STATE OF NEW YORK**

---

**A.**

The appellees and the *amicus curiae* attempt to buttress their arguments that New York Civil Service Law § 53 should be reviewed under the "compelling state interest test" by urging that two fundamental rights of aliens are



infringed by the statute: the right to interstate travel (Appellees' Brief, pp. 18-19) and the right to work (Brief of the Commonwealth of Pennsylvania as *Amicus Curiae*, hereinafter "Brief for Pennsylvania," pp. 6-8).<sup>\*</sup> The question of whether aliens possess a right to interstate travel is not presented by the case at bar. Assuming *arguendo* that the Court finds the question relevant, aliens do not possess that fundamental right as it has been articulated by this Court. Nor do they possess a fundamental right to work which is affected by § 53.

In order to place the right to travel in issue, the state action under review must prohibit or penalize the exercise of that right. *Dunn v. Blumstein*, 405 U.S. 330, 338-343; *Shapiro v. Thompson*, 394 U.S. 618, 627-634. In *Dunn*, the Court observed that the state and county durational residence requirements for voting there invalidated "single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right [to interstate travel] and penalize such travelers directly." 405 U.S. *supra* at 338. Accord, *Shapiro v. Thompson*, *supra* at 634, stating that a one year durational residence requirement for public assistance "denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the 'jurisdiction.'" See *United States v. Guest*, 383 U.S. 745, 760 (sustaining the application of § 241 of the Civil Rights Act of 1964 to conspiracies whose "predominant purpose" is to prevent or impede interstate travel); *Edwards v. California*, 314 U.S. 160, 174 (invalidating statute on Commerce Clause grounds which made it a misdemeanor to bring an indigent person to the state, stating that "[t]he burden upon interstate commerce is intended and immediate; it is the plain and sole function of the statute").

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<sup>\*</sup> The inappropriateness of designating § 53 as a "suspect classification" in order to apply the "compelling state interest test" is argued in Appellant's Main Brief at Point I, Subpoint A, pp. 13-21.

The basis of the classification established by § 53 is alien status not interstate movement. Cf. *Dunn v. Blumstein*, *supra* at 335. Under the statute, the alien newly arrived in the state is treated identically with the longer-term alien resident.\* He is neither prohibited nor penalized for traveling. Accordingly, the question of whether aliens possess a right to travel is not reached. *Dunn v. Blumstein*, *supra* at 342 n. 12 (citing the illustration of differing ages for drivers licenses among states as not constituting a penalty on travel since all residents must meet the prescribed age requirement).

To hold otherwise would mean that diversity among state laws, however minimal, itself gives rise to a right to travel claim (Appellees' Brief, p. 18). No support for so broad an application of the right to travel is found in the decisions of this Court. See discussion, *ante* pp. 2-3. Certainly, *Truax v. Raich*, 239 U.S. 33, cited by appellees, does not support this proposition. There the Court recognized the alien's "privilege of entering and abiding in the United States" and "in any State in the Union", 239 U.S. *supra* at 39, as consistent with diverse state laws limiting aliens' participation in the distribution of public resources, 232 U.S. 39-40 (citing e.g., *McCready v. Virginia*, 94 U.S. 391; *Patson v. Pennsylvania*, 232 U.S. 138, and in public employment, 239 U.S. *supra* at 40; *Heim v. McCall*, 239 U.S. 195. The concern that aliens not be "segregated in such of the states as chose to offer hospitality." 239 U.S. *supra* at 42, was properly limited to assuring them access to "the ordinary means of earning a livelihood," 239 U.S. *supra* at 41, not nationwide uniformity of treatment.

Assuming *arguendo* that the court finds that § 53 provides a basis for invoking the right to travel, aliens possess

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\* The extent of the alien's access to employment in the career civil service is a function of the number of waivers in effect under § 53 subd. 2, not the length of his residence in New York State.

no such fundamental right.\* Although the court has not identified this right with any particular provision of the Constitution, *Graham v. Richardson*, *supra* at 375; *Shapiro v. Thompson*, *supra* at 630; *United States v. Guest*, *supra* at 757-759, it has been traditionally considered an incident of national citizenship. *Oregon v. Mitchell*, 400 U.S. 112, 285-86 (opinion of STEWART, J.). *Shapiro v. Thompson*, *supra* at 629-631 and opinion of HARLAN, J., dissenting at 666-671; *United States v. Guest*, *supra* at 757-759 and opinion of HARLAN, J. concurring in part and dissenting in part at 763-770.

The alien's privilege of entering and abiding "in any State in the Union," *Truax v. Raich*, *supra* at 39, is not synonymous with the fundamental right to travel. The former derives from federal control of foreign relations and immigration and naturalization, *Truax v. Raich*, *supra* at 39, 42, whereas the latter is constitutionally mandated. The former does not exist except in a qualified or conditional form whereas the latter may not be conditioned except upon a showing of necessity. *Dunn v. Blumstein*, *supra* at 338-343.

The qualified nature of the alien's right to interstate movement is recognized in *Truax v. Raich*, *supra* at 39-40, which did not consider limitations on the public employment of aliens as obstacles to entry and abode. Under international common law, the alien's rights of "sojourn and trade" and "circulation and residence", Borchard, *Diplomatic Protection of Citizens Abroad*, § 24, p. 42 (1927) do not assure him equality of treatment with citizens. To the contrary, they are considered consistent with diverse national limitations which include restrictions on aliens' participation in the career civil service and the professions. Gordon and Rosenfeld, *Immigration Law and Procedure*,

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\* The question of whether or not aliens have the right to travel was not reached in *Graham v. Richardson*, 405 U.S. 365, 375 or by the three-judge court below (A. 91 n. 3).

§ 1.34a, pp. 1-118-1-122 (rev. ed. 1972); Roth, *The Minimum Standard of International Law Applied to Aliens*, 151-154, 156-160 (1949). American treaty commitments permitting nationals of the other contracting party to travel freely and to choose their places of residence within the United States do not provide for identical treatment for citizens and aliens in the professions\* and stand with the limitations on aliens in the federal career service established by the federal executive and Congress. See Appellant's Main Brief, pp. 14-15, 35, 36 and Exhibit "1". No treaty to date has been construed to provide aliens with access to public employment. *Heim v. McCall*, *supra* at 193-194. Moreover, a judicial reinterpretation of an alien's right to travel in the case at bar would impair the bargaining power of the United States with other nations which place substantially identical limitations on the employment of aliens in the career civil service\*\* and jeopardize the constitutionality of such federal legislation as the Alien Registration Act, 8 U.S.C. § 1301 *et seq.*

The *amicus curiae's* argument that aliens possess a "basic" or fundamental right to work which is violated by § 53 is similarly in error (Brief for Pennsylvania, pp. 6-8). *Truax v. Raich*, *supra* at 41, holds only that the aliens must be assured access to the "ordinary means of earning a livelihood" in the "common occupations of the com-

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\* E.g. Treaty of Friendship, Commerce and Navigation between the Netherlands and the United States of America, Art. II, cl. 3, Art. VII and Protocol, 8 U.S.T. 2043 (1956); Treaty of Friendship, Commerce and Navigation between the United States of America and Italy, Art. I, 63 Stat. 2255 (1948).

\*\* The *Handbook of Civil Service Laws and Practices* published by the United Nations Department of Economics and Social Affairs, Public Administration Branch, in 1966 lists the following nations, among others, as requiring citizenship for employment in the career civil service: United Kingdom (p. 52), Ghana (pp. 52-53), India and Ceylon (p. 53), France (p. 175), Lebanon (p. 179), Ivory Coast (p. 180), Morocco (p. 181), Tunisia (p. 183), Union of the Soviet Socialist Republics, Czechoslovakia, Poland and Yugoslavia (pp. 382-387).

munity" which do not include public employment, 239 U.S. *supra* at 40. As with travel, the qualified nature of the alien's "right" to work is reflected in both international common law and treaties. Neither affords access to the career civil service or even to the professions.\* See discussion, *ante* pp. 4-5.

## B.

The arguments of appellees (Appellees' Brief, pp. 12-15, 16-17) and the *amicus curiae* (Brief for Pennsylvania, pp. 14-15) that New York Civil Service Law § 53 conflicts with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and with 42 U.S.C. § 1981 and thus violates the Supremacy Clause have been refuted in Appellant's Main Brief at Point II, pp. 33-37. Appellees' additional arguments that § 53 violates the Supremacy Clause because it conflicts with provisions of treaties in force and with federal policy as expressed in the Equal Employment Opportunities Act of 1964, 42 U.S.C. § 2000e *et seq.*, must also be rejected (Appellees' Brief, pp. 15-16, 17).

The provisions of the United Nations Charter, 59 Stat. 1035 (1945) pledging the member nations to "develop friendly relations among nations based on respect for the principle of equal rights" (Art. 1, cl. 2), "promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 55c) and to "join and separate action . . . for the achievement of [these] purposes" (Art. 56) do not supersede federal and state laws distinguishing between citizens and aliens. *Sei Fuji v. State*, 242 P. 2d 617, 619-622 (Cal. Sup. Ct. 1952); *Itatai v. Immigration and Naturalization Service*, 343 F. 2d 466

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\* Federal laws prohibit aliens, *inter alia*, from registering aircraft (49 U.S.C. § 1401(b)), registering and commanding vessels (46 U.S.C. §§ 221, 236, 242, 50 U.S.C. § 198(b)), operating radio stations (47 U.S.C. § 303) and atomic energy licenses (42 U.S.C. § 2133(d)).

(2d Cir. 1965); *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961). Cf. *Foster v. Neilson*, 27 U.S. [2 Pet.] 253. In the area of fundamental human rights, the Charter states "general purposes and objectives of the United Nations Organization." *Sei Fuji v. State*, *supra* at 620. It does not "purport to impose legal obligations on individual member nations or to create rights in private persons.", 242 P. 2d *supra* at 620-621. "[I]t is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon ratification of the charter." 242 P. 2d *supra* at 621. No greater significance can be attached to the precatory language of the Charter of the Organization of American States. 2 U.S.T. 2394 (1948).

Moreover, § 53 does not contravene the principles expressed in either charter. See discussion, *ante* pp. 4-5, 6. As demonstrated by the almost universal exclusion of aliens from the career civil service\* the international community of nations, as the United States and the State of New York, does not consider that "principles of equality" between citizens and aliens intend an identity between them in the affairs of state. Access to public employment is assured only to nationals, not aliens. As stated in the Universal Declaration of Human Rights adopted by the United Nations General Assembly pursuant to the principles expressed in the United Nations Charter at Article 21 (U.N. Gen. Res. 217, Dec. 10, 1948, reprinted in Senate Committee on Foreign Relations, Subcommittee on the United Nations Charter, *Review of the United Nations Charter: A Collection of Documents* 247 (1954)):

- (1) Everyone has the right to take part in the government of *his own country*, directly or through freely chosen representatives.

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\* See footnote, *ante* p. 5 and Appellant's Main Brief, p. 22.



- (2) Everyone has the right of equal access to public service in his own country. (Emphasis supplied)

Reliance on the Equal Opportunities Employment Act of 1964, 42 U.S.C. § 2000e *et seq.*, is similarly inappropriate.\*\* Although § 2000e-2 provides, *inter alia*, that it shall be an unlawful employment practice to discriminate among individuals on the basis of "national origin", the term national origin refers to distinctions among persons who are citizens and not to distinctions between citizens and aliens. *Espinoza v. Farah Manufacturing Co., Inc.*, 462 F. 2d 1331, 1332, 1333, 1334 (5th Cir. 1972); *Mow Sun Wong v. Hampton*, 333 F. Supp. 527, 530 (D.C. Cal. N.D., 1971) (construing same term in Executive Order No. 11478, 34 Fed. Reg. 12985 (filed Aug. 8, 1969) providing for equal opportunity in federal employment). Similarly, the International Labour Organisation only prohibits discrimination on the basis of "national extraction," not alienage. Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), Art. 1 § 1(a) (1958); International Labour Office, *ILO's Action Against Discrimination in Employment* 12-13 (1968); International Labour Office, *Fighting Discrimination in Employment and Occupation* 119-122 (1968); International Labour Conference, *Discrimination in the Field of Employment and Occupation* (Report VII(1)) p. 17 (1957). Even if the term "national origin" were interpreted to include aliens as well as citizens, § 53 must be sustained under the *bona fide* occupational qualification exemption in § 2000e-2(e). See Appellant's Main Brief, Point II, Subpoint B, pp. 22-31.

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\*\* 42 U.S.C. § 2000e subsections (a) and (b) were amended by Pub. L. 92-261, 86 Stat. 103 (1972), to include states and their political subdivisions as employers under the act.



## C.

The invalidation of New York Civil Service Law § 53 would require the State of New York and its political subdivisions to treat citizens and aliens on an identity of terms for appointments and promotions within the career civil service (Appellant's Main Brief, pp. 28-31). As a result, the conduct of the affairs of government would be placed in the hands of persons who do not, and cannot, bear complete allegiance to the state (Appellant's Main Brief, pp. 22-26).

Neither the appellees nor the *amicus curiae* refute the appellant on this point but seek to persuade the Court that there is no proof that any of the appellees, or any alien in particular, is disloyal to the United States and the State of New York (Appellees' Brief, pp. 10-12; Brief for Pennsylvania, pp. 10-11\*).

This Court has already recognized that the alien may be excluded from businesses affected by the public interest because of his identity with his homeland. *Pearl Assurance Co. Ltd. v. Harrington*, 38 F. Supp. 411, 413 (D. Mass. 1941) (per FRANKFURTER, J.) *aff'd per curiam* 313 U.S. 549 (sustaining requirement that alien insurance companies doing business in Massachusetts employ citizen resident managers). Even more than the dual national, the alien is subject to obligations which compete and conflict with the demands of positions of public trust. As well, he is subject to circumstances which may compel him "to do acts which would not be compatible with the obligations of American citizenship" and thus with the obliga-

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\* The role of Commonwealth of Pennsylvania in this appeal is problematical. Having unsuccessfully defended its exclusion of aliens from welfare benefits, where no question of the identity of the alien with the public interest was involved, *Sailer v. Leger*, companion case to *Graham v. Richardson*, *supra*, Pennsylvania now sides with the appellees in face of its own legislation which is parallel with that of the State of New York (Brief for Pennsylvania, p. 2).

tions upon the public servant of that citizenry. *Rogers v. Bellei*, 401 U.S. 815, 832 citing *Kawakita v. United States*, 343 U.S. 717, 733, 736 (per DOUGLAS, J.). Accord, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 187 (per BRENNAN, J.).

In face of these observations, the choice of the State of New York to conduct its internal affairs through the agency of its own citizens must be sustained and the "separate and independent existence of [the] states and their governments" reaffirmed. *Oregon v. Mitchell*, *supra* at 125 (opinion of BLACK, J.).

### CONCLUSION

**The decision below should be reversed and the complaint dismissed.**

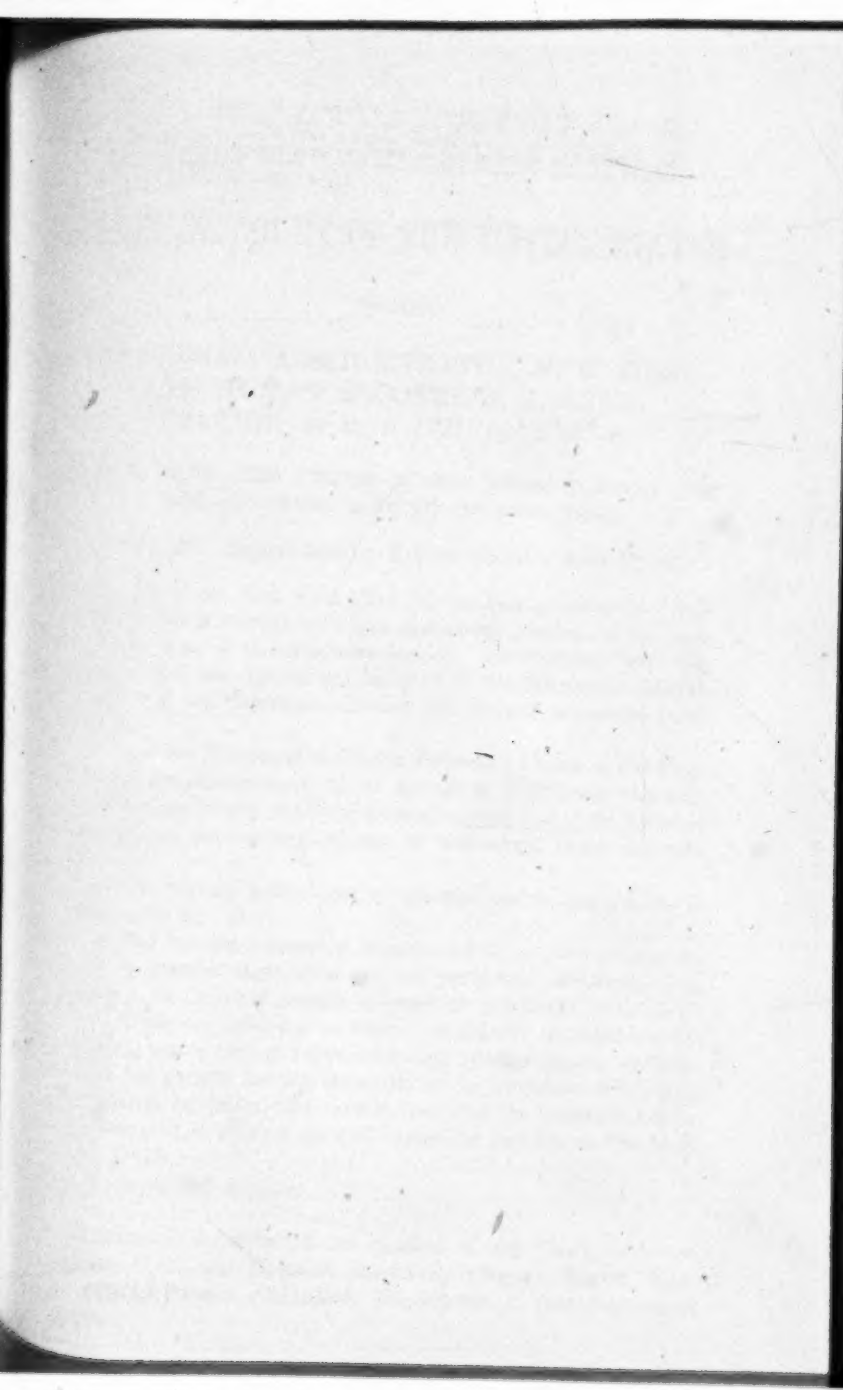
Dated: New York, New York, January 3, 1973.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

### SUGARMAN, ADMINISTRATOR, NEW YORK CITY HUMAN RESOURCES ADMINIS- TRATION, ET AL. v. DOUGALL ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

No. 71-1222. Argued January 8, 1973—Decided June 25, 1973

Section 53 of the New York Civil Service Law provides that only United States citizens may hold permanent positions in the competitive class of the state civil service. The District Court concluded that the statute was violative of the Fourteenth Amendment and the Supremacy Clause, and granted injunctive relief.  
*Held:*

1. Section 53 violates the Equal Protection Clause of the Fourteenth Amendment since, in the context of New York's statutory civil service scheme, it sweeps indiscriminately and is not narrowly limited to the accomplishment of substantial state interests.  
Pp. 5-9.

2. The "special public interest" doctrine has no applicability in this case. Pp. 10-11.

3. Nor can the citizenship requirement be justified on the unproved premise that aliens are less permanent employees than citizens, or on other grounds asserted by appellants. Pp. 11-13.

4. While the State has an interest in defining its political community, and a corresponding interest in establishing the qualifications for persons holding state elective or important nonelective executive, legislative, and judicial positions, the broad citizenship requirement established by § 53 cannot be justified on this basis.  
Pp. 13-15.

339 F. Supp. 906, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion.



NOTICE : This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 71-1222

Jule M. Sugarman, Etc., et al., Appellants, v. Patrick McL. Dougall et al.	}	On Appeal from the United States District Court for the South- ern District of New York.
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[June 25, 1973]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Section 53 (1) of the New York Civil Service Law reads:

"Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."<sup>1</sup>

<sup>1</sup> The restriction has its statutory source in Laws of New York, 1939, c. 767, § 1. We are advised that the legislation was declarative of an administrative practice that had existed for many years. Tr. of Oral Arg. 43, 45.

Section 53 (2) makes a temporary exception to the citizenship requirement:

"2. Notwithstanding any of the provisions of this chapter or of any other law, whenever a department head or appointing authority deems that an acute shortage of employees exists in any particular class or classes of positions by reason of a lack of a sufficient number of qualified personnel available for recruitment, he may present evidence thereof to the state or municipal civil service commission having jurisdiction which, after due inquiry, may determine the existence of such shortage and waive the citizenship requirement for appointment to such class or classes of positions. The state commission or such municipal commission, as the case may be, shall annually review each such waiver of the citizenship requirement,



The four appellees, Patrick McL. Dougall, Esperanza Jorge, Teresa Vargas, and Sylvia Castro, are federally registered resident aliens. When, because of their alienage, they were discharged in 1971 from their competitive civil service positions with the city of New York, the appellees instituted this class action challenging the constitutionality of § 53. The named defendants, and appellants here, were the Administrator of the city's Human Resources Administration (HRA), and the city's Director of Personnel and Chairman of its Civil Service Commission. The appellees sought (1) a declaration that the statute was invalid under the First and Fourteenth Amendments, (2) injunctive relief against any refusal, on the ground of alienage, to appoint and employ the appellees, and all persons similarly situated, in civil service positions in the competitive class, and (3) damages for lost earnings. A defense motion to dismiss for want of jurisdiction was denied by Judge Tenney, 330 F. Supp. 265 (SDNY 1971). A three-judge court was convened. That court ruled that the statute was violative of the Fourteenth Amendment and the Supremacy Clause, and granted injunctive relief. 339 F. Supp. 906 (SDNY 1971).<sup>2</sup> Judge Lumbard joined the

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and shall revoke any such waiver whenever it finds that a shortage no longer exists. A non-citizen appointed pursuant to the provisions of this section shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship."

It is to be observed that an appointment under this exception permits the alien to continue his employment only until, on annual review, it is deemed that "a shortage no longer exists." And, in any event, the alien "shall not be eligible for continued employment unless he diligently prosecutes the procedures for citizenship."

<sup>2</sup> The court found jurisdiction in the civil rights statutes, 28 U. S. C. §§ 1343 (3) and (4). 339 F. Supp. 906, 907 n. 5. It held that the suit was properly maintainable as a class action and defined the class as consisting of "all permanent resident aliens residing in New York State who, but for the enforcement of Section 53,

court's opinion and judgment, but wrote separately in concurrence. *Id.*, at 911. Probable jurisdiction was noted. 407 U. S. 908 (1972).

## I

Prior to December 28, 1970, the appellees were employed by nonprofit organizations that received funds through HRA from the United States Office of Economic Opportunity. These supportive funds ceased to be available about that time and the organizations, with approximately 450 employees, including the appellees and 16 other noncitizens, were absorbed by the Manpower Career and Development Agency (MCDA) of HRA.<sup>3</sup> The appellant Administrator advised the transferees that they would be employed by the city.<sup>4</sup> The appellees in fact were so employed in MCDA. In February, however, they were informed that they were ineligible for employment by the city and that they would be dismissed under the statutory mandate of § 53 (1). Shortly thereafter they were discharged from MCDA solely because of their alienage.<sup>5</sup>

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would otherwise be eligible to compete for employment in the competitive class of Civil Service." 339 F. Supp., at 907 n. 4.

<sup>3</sup> Affidavit of Harold O. Basden, Director of Personnel of the Human Resources Administration, App. 31-33.

<sup>4</sup> Section 45 of the New York Civil Service Law, applicable to employees of a private institution acquired by the State or a public agency, contains a restriction, similar to that in § 53 (1), against the employment of an alien in a position classified in the competitive class.

<sup>5</sup> The appellants in their answer alleged that appellee Castro was terminated for the additional reason that she lacked sufficient experience to qualify for the position of senior human resources technician. The three-judge court in its order, App. 93, excluded appellee Castro from the recognized class. That exclusion is not contested here.

Appellee Dougall was born in Georgetown, Guyana, in September 1927. He has been a resident of New York City since 1964. He was employed by MCDA as an administrative assistant in the staff Development Unit.

Appellee Jorge was born in November 1948 in the Dominican Republic. She has been a resident of New York City since 1967. She was employed by the Puerto Rican Forum as a clerk-typist and, later, as a human resources technician. She worked in the latter capacity for MCDA.

Appellee Vargas was born in the Dominican Republic in June 1946. She has been a resident of New York City since 1963. She worked as a clerk-typist for the Puerto Rican Forum and in the same capacity for MCDA.

Appellee Castro was born in El Salvador in June 1944. She has resided in New York City since 1967. She was employed by the Puerto Rican Forum as an assistant counselor and then as a human resources technician and worked in the latter capacity for MCDA.

The record does not disclose that any of the four appellees ever took any step to attain United States citizenship.

The District Court, in reaching its conclusion that § 53 was unconstitutional under the Fourteenth Amendment, placed primary reliance on this Court's decisions in *Graham v. Richardson*, 403 U. S. 365 (1971), and *Takahashi v. Fish Comm'n*, 334 U. S. 410 (1948), and, to an extent, on *Purdy & Fitzpatrick v. State*, 71 Cal. 2d 566, 456 P. 2d 645 (1969). On the basis of these cases, the court also concluded that § 53 was in conflict with Congress' comprehensive regulation of immigration and naturalization because, in effect, it denied appellees entrance to, and abode in, New York. Accordingly, the court held, § 53 encroached upon an exclusive federal

power and was constitutionally impermissible under Art. VI, cl. 2, of the Constitution.

## II

As is so often the case, it is important at the outset to define the precise and narrow issue that is here presented. The Court is faced only with the question whether New York's flat statutory prohibition against the employment of aliens in the competitive classified civil service is constitutionally valid. The Court is not asked to decide whether a particular alien, any more than a particular citizen, may be refused employment or discharged on an individual basis for whatever legitimate reason the State might possess.

Neither is the Court reviewing a legislative scheme that bars some or all aliens from closely defined and limited classes of public employment on a uniform and consistent basis. The New York scheme, instead, is indiscriminate. The general standard is enunciated in the State's Constitution, Art. V, § 6, and is to the effect that appointments and promotions in the civil service "shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." In line with this rather flexible constitutional measure, the classified service is divided by statute into four classes. New York Civil Service Law § 40. The first is the exempt class. It includes, generally, the higher offices in the state executive departments, certain municipal officers, certain judicial employees, and positions for which a competitive or noncompetitive examination may be found to be impracticable. The exempt class contains no citizenship restriction whatsoever. § 41. The second is the noncompetitive class. This includes positions, not otherwise classified, for which a noncompetitive examination

would be practicable. There is no citizenship requirement. § 42. The third is the labor class. This includes unskilled laborers holding positions for which competitive examinations would be impracticable. No alienage exclusion is imposed. § 43. The fourth is the competitive class with which we are here concerned. This includes all positions for which it is practicable to determine merit and fitness by a competitive examination. § 44. Only citizens of the United States may hold positions in this class. § 53. The limits of these several classes, particularly the competitive class from which the appellees were deemed to be disqualified, are not readily defined. It would appear, however, that, consistent with the broad scope of the cited constitutional provision, the competitive class reaches various positions in nearly the full range of work tasks, that is, all the way from the menial to the policy making.

Apart from the classified civil service, New York has an unclassified service. § 35. This includes, among others, all elective offices, offices filled by legislative appointment, employees of the legislature, various offices filled by the Governor, and teachers. No citizenship requirement is present there.

Other constitutional and statutory citizenship requirements round out the New York scheme. The constitution of the State provides that voters, Art. II, § 1, members of the legislature, Art. III, § 7, the Governor and Lieutenant Governor, Art. IV, § 2, and the Comptroller and Attorney General, Art. V, § 1, are to be United States citizens. And Public Officers Law § 3 requires that any person holding "a civil office" be a citizen of the United States. A "civil office" is apparently one that "possesses any of the attributes of a public officer or . . . involve[s] some portion of the sovereign [sic] power." 1967 Opin. Atty. Gen. 60; *New York Post Corp. v. Moses*, 12 A. D.

2d 243, 250, 210 N. Y. Supp. 2d 88, 95 (1961), rev'd on other grounds, 10 N. Y. 2d 199, 176 N. E. 2d 709 (1961).

We thus have constitutional provisions and a number of statutes that, together, constitute New York's scheme for the exclusion of aliens from public employment. The present case concerns only § 53 of the Civil Service Law. The section's constitutionality, however, is to be judged in the context of the State's broad statutory framework and the justifications the State presents.

### III

It is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause. *Graham v. Richardson*, 403 U. S. 365, 371 (1971); *Truax v. Raich*, 239 U. S. 33, 39 (1915); *Wong Wing v. United States*, 163 U. S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886). See *Application of Griffiths*, post, —. This protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who "work for a living in the common occupations of the community." *Truax v. Raich*, 239 U. S., at 41.

A. Appellants argue, however, that § 53 does not violate the equal protection guarantee of the Fourteenth Amendment because the statute "establishes a generic classification reflecting the special requirements of public employment in the career civil service." <sup>6</sup> The distinction drawn between the citizen and the alien, it is said, "rests on the fundamental concept of identity between a government and the members, or citizens, of the state." <sup>7</sup> The civil servant "participates directly in the formulation and execution of governmental policy," and thus must be free of competing obligations to another power. <sup>8</sup>

<sup>6</sup> Brief for Appellants 17.

<sup>7</sup> *Id.*, at 22.

<sup>8</sup> *Id.*, at 23.



The State's interest in having an employee of undivided loyalty is substantial, for obligations attendant upon foreign citizenship "might impair the exercise of his judgment or jeopardize public confidence in his objectivity."<sup>9</sup> Emphasis is placed on our decision in *United Public Workers v. Mitchell*, 330 U. S. 75 (1947), upholding the Hatch Act and its proscription of political activity by certain public employees, and it is said that the public employer "has broad discretion to establish qualifications for its employees related to the integrity and efficiency of the operations of government."<sup>10</sup>

It is at once apparent, however, that appellants' asserted justification proves both too much and too little. As the above outline of the New York scheme reveals, the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose. Our standard of review of statutes that treat aliens differently from citizens requires a greater degree of precision.

In *Graham v. Richardson*, 403 U. S., at 372, we observed that aliens as a class "are a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153, n. 4 (1938)), and that classifications based on alienage are "subject to close judicial scrutiny." And as long as a quarter century ago we held that the State's power "to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *Takahasi v. Fish Comm'n*, 334 U. S., at 420. We therefore look to

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<sup>9</sup> *Ibid.*

<sup>10</sup> Brief for Appellants 13.



the substantiality of the State's interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined.

Applying this standard to New York's purpose in confining civil servants in the competitive class to those persons who have no ties of citizenship elsewhere, § 53 does not withstand the necessary close scrutiny. We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within "the basic conception of a political community." *Dunn v. Blumstein*, 405 U. S. 330, 344 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose.

Section 53 is neither narrowly confined nor precise in its application. Its imposed ineligibility may apply to the "sanitation man, class B," *Perotta v. Gregory*, 4 Misc. 2d 769, 158 N. Y. Supp. 2d 221 (1957), to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately. Viewing the entire constitutional and statutory framework in the light of the State's asserted interest, the great breadth of the requirement is even more evident. Sections 35 and 41 of the Civil Service Law, relating generally to persons holding elective and high appointive offices, contain no citizenship restrictions. Indeed, even § 53 permits an alien to hold a classified civil service position under certain circumstances. In view of the breadth and imprecision of § 53 in the context of the State's interest, we conclude that the statute does not withstand close judicial scrutiny.

B. Appellants further contend, however, that the State's legitimate interest is greater than simply limiting to citizens those high public offices that have to do with the formulation and execution of state policy. Understandably relying on this Court's decisions in *Crane v. New York*, 239 U. S. 195 (1915), *Heim v. McCall*, 239 U. S. 175 (1915), and *Ohio ex rel. Clarke v. Deckebach*, 274 U. S. 392 (1927), appellants argue that a State constitutionally may confine public employment to citizens. Mr. Justice (then Judge) Cardozo accepted this "special public interest" argument because of the State's concern with "the restriction of the resources of the state to the advancement and profit of the members of the state." *People v. Crane*, 214 N. Y. 154, 161, 108 N. E. 427, 429 (1915), *aff'd*, 239 U. S. 195, *supra*. We rejected that approach, however, in the context of public assistance in *Graham*, where it was observed that "the special public interest doctrine was heavily grounded on the notion that '[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship.' *People v. Crane*. . . . But this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" 403 U. S., at 374. See also *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Shapiro v. Thompson*, 394 U. S. 618, 627 n. 6 (1969); *Goldberg v. Kelly*, 397 U. S. 254, 262 (1970); *Bell v. Burson*, 402 U. S. 535, 539 (1971).

Appellants argue that our rejection of the special public interest doctrine in a public assistance case does not require its rejection here. That the doctrine has particular applicability with regard to public employment is demonstrated, according to appellants, by the decisions in *Crane* and *Heim* that upheld, under Four-

teenth Amendment challenge, those provisions of the New York Labor Law that confined employment on public works to citizens of the United States.<sup>11</sup> See M. Konvitz, *The Alien and the Asiatic in American Law*, c. 6 (1946).

We perceive no basis for holding the special public interest doctrine inapplicable in *Graham* and yet applicable and controlling here. A resident alien may reside lawfully in New York for a long period of time. He must pay taxes. And he is subject to service in this country's armed forces. 50 U. S. C. App. § 454 (a). See *Astrup v. Immigration Service*, 402 U. S. 509 (1971). The doctrine, rooted as it is in the concepts of privilege and of the desirability of confining the use of public resources, has no applicability in this case. To the extent that *Crane*, *Heim*, and *Ohio ex rel. Clark v. Deckebach* intimate otherwise, they were weakened by the decisions in *Takahashi* and *Graham*, and are not to be considered as controlling here.

C. The State would tender other justifications for § 53's bar to employment of aliens in the competitive civil service. It is said that career civil service is intended for the long term employee, and that the alien, who is subject to deportation and, as well, to conscription by his own country, is likely to remain only temporarily in a

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<sup>11</sup> In the past the Court has invoked the special public interest doctrine to uphold statutes that, in the absence of overriding treaties, limit the right of noncitizens to exploit a State's natural resources, *McCready v. Virginia*, 94 U. S. 391 (1877); *Pastore v. Pennsylvania*, 232 U. S. 138 (1914), to inherit real property, *Hauenstein v. Lynham*, 100 U. S. 483 (1880); *Blythe v. Hinckley*, 180 U. S. 333 (1901), and to acquire and own land, *Terrace v. Thompson*, 263 U. S. 197 (1923); *Porterfield v. Webb*, 263 U. S. 225 (1923); *Webb v. O'Brien*, 263 U. S. 313 (1923); *Frick v. Webb*, 263 U. S. 326 (1923); but see *Oyama v. California*, 332 U. S. 633 (1948).

civil service position. We fully agree with the District Court's response to this contention:

"There is no offer of proof on this issue and [appellants] would be hard pressed to demonstrate that a permanent resident alien who has resided in New York or the surrounding area for a number of years, as have [appellees], and whose family also resides here, would be a poorer risk for a career position in *New York* . . . than an American citizen, who, prior to his employment with the City or State, had been residing in another state." 339 F. Supp., at 909.

Appellants further assert that employment of aliens in the career civil service would be inefficient, for when aliens eventually leave their positions, the State will have the expense of hiring and training replacements. Even if we could accept the premise underlying this argument—that aliens are more likely to leave their work than citizens—and assuming that this rationale could be logically confined to the classified competitive civil service, the State's suggestion does not withstand examination. As we stated in *Graham*, noting the general identity of an alien's obligations with those of a citizen, the "justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class consists of aliens." 403 U. S., at 376.

We hold that § 53, which denies all aliens the right to hold positions in New York's classified competitive civil service, violates the Fourteenth Amendment's equal protection guarantee.<sup>12</sup>

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<sup>12</sup> We are aware that citizenship requirements are imposed in certain aspects of the federal service. See 5 U. S. C. § 3301; Executive Order 10577, 19 Fed. Reg. 7521, § 2.1 (1954); 5 CFR §§ 338.101, 302.203 (g) (1973); and, for example, Treasury, Postal Service, and General Government Appropriation Act, 1972, § 602,

Because of this conclusion, we need not reach the issue whether the citizenship restriction is in conflict with Congress' comprehensive regulation of immigration and naturalization. See *Graham v. Richardson*, 403 U. S., at 376-380.

#### IV

While we rule that § 53 is unconstitutional, we do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee. We hold only that a flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.

Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. Just as "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections," *Oregon v. Mitchell*, 400 U. S. 112, 124-125 (1970) (footnote omitted) (opinion of Black, J.); see *id.*, at 201 (opinion of Harlan, J.), and *id.*, at 293-294 (opinion of STEWART, J.), "[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Boyd v. Thayer*, 143 U. S. 135, 161 (1892). See *Luther v. Borden*,

Pub. L. 92-49, 85 Stat. 122, and Public Works Appropriations Act, 1971, § 502, Pub. L. 91-439, 84 Stat. 902. In deciding the present case, we intimate no view as to whether these federal citizenship requirements are or are not susceptible to constitutional challenge. See *Jalil v. Hampton*, 148 U. S. App. D. C. 415, 460 F. 2d 923, cert. denied, 409 U. S. 887 (1972). Note, *Aliens and the Civil Service: A Closed Door*, 61 Geo. L. J. 207 (1972).

7 How. 1, 41 (1849); *Pope v. Williams*, 193 U. S. 621, 632-633 (1904). Such power inheres in the State by virtue of its obligation, already noted above, "to preserve the basic conception of a political community." *Dunn v. Blumstein*, 405 U. S., at 344. And this power and responsibility of the State applies not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. There, as Judge Lumbard phrased it in his separate concurrence, is "where citizenship bears some rational relationship to the special demands of the particular position." 339 F. Supp., at 911.

We have held, of course, that such state action, particularly with respect to voter qualifications, is not wholly immune from scrutiny under the Equal Protection Clause. See, for example, *Kramer v. Union School District*, 395 U. S. 621 (1969). But our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. *Id.*, at 625; *Carrington v. Rash*, 380 U. S. 89, 91 (1965). This is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions, *Pope v. Williams*, 193 U. S., at 632-634; *Boyd v. Thayer*, 143 U. S., at 161, and a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.<sup>13</sup> Const. Art. IV,

<sup>13</sup> In congressional debates leading to the adoption of the Fourteenth Amendment, there is clear evidence that Congress not only knew that as a matter of local practice aliens had not been granted the right to vote, but that under the amendment they did not receive a constitutional right of suffrage or a constitutional right



§ 4; Const. Amend. X; *Luther v. Borden*, *supra*; see *In re Duncan*, 139 U. S. 449, 461 (1891). This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights. *Kramer v. Union School District*, 395 U. S., at 625; *Reynolds v. Sims*, 377 U. S. 533, 567, 568 (1964); *Harper v. Virginia Bd. of Elections*, 383 U. S. 663, 666-667 (1966); *Carrington v. Rash*, 380 U. S., at 91, 93-94, 96; *Lassiter v. Northampton Election Bd.*, 360 U. S. 45, 50-51 (1959); *Mason v. Missouri*, 179 U. S. 328, 335 (1900). A restriction on the employment of noncitizens, narrowly confined, could have particular relevance to this important state responsibility, for alienage itself is a factor that reasonably could be employed in defining "political community."

The judgment of the District Court is

*Affirmed.*

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to participate in the political process of state government, and that, indeed, the right to vote and the concomitant right of participation in the political process were matters of local law. Cong. Globe, 39th Cong., 1st Sess., 141-142, 2766-2767 (1866).

It is noteworthy, as well, that the 40th Congress considered and very nearly proposed a version of the Fifteenth Amendment that expressly would have prohibited discriminatory qualifications not only for voting but also for holding office. The provision was stricken in conference. It is evident from the debate that, for whatever motive, its opponents wanted the States to retain control over the qualifications for office. Cong. Globe, 40th Cong., 3d Sess., at 1425-1426, 1623-1633 (1869). And, of course, the Fifteenth Amendment applies by its terms only to "citizens."





# SUPREME COURT OF THE UNITED STATES

Nos. 71-1222 AND 71-1336

Jule M. Sugarman, Etc., et al.,  
Appellants,  
71-1222 v.  
Patrick McL. Dougall et al. } On Appeal from the  
United States District  
Court for the South-  
ern District of New  
York.

In re Application of Fre Le Poole  
Griffiths for Admission to  
the Bar, Appellant.  
71-1336 } On Appeal from the  
Superior Court of  
Connecticut.

[June 25, 1973]

MR. JUSTICE REHNQUIST, dissenting.

The Court in these two cases holds that an alien is not really different from a citizen, and that any legislative classification on the basis of alienage is "inherently suspect". The Fourteenth Amendment, the Equal Protection Clause of which the Court interprets as invalidating the State legislation here involved, contains no language concerning "inherently suspect classifications," or, for that matter, merely "suspect classifications." The principal purpose of those who drafted and adopted the Amendment was to prohibit the States from invidiously discriminating by reason of race, *Slaughterhouse Cases*, 16 Wall. 36 (1873), and, because of this plainly manifested intent, classifications based on race have rightly been held "suspect" under the Amendment. But there is no language used in the Amendment, nor any historical evidence as to the intent of the Framers, which would suggest the slightest degree that it was intended to render alienage a "suspect" classification, that it was designed in any way to protect "discrete and insular minorities" other than racial minorities, or that it would in any

way justify the result reached by the Court in these two cases.

Two factual considerations deserve more emphasis than accorded by the Court's opinions. First, the records in 71-1222 and 71-1336 contain no indication that the aliens suffered any disability that precluded them either as a group or individually from applying for and being granted the status of naturalized citizens. The appellees in 71-1222, as far as the record discloses, took no steps to obtain citizenship nor indicated any affirmative desire to become citizens. In 71-1336, appellant was eligible for naturalization but "elected to remain a citizen of the Netherlands" and deliberately chose not to file a declaration of intent under 8 U. S. C. §§ 1427 (f), 1430 (a). The "status" of these individuals was not, therefore, one with which they were forever encumbered; they could take steps to alter it when and if they chose.<sup>1</sup>

Second, the appellees in 71-1222 all sought to be employees of administrative agencies of the New York City government. Of the 20 members of the class represented by the named appellees, three were typists, one a "senior clerk," two "human resources technicians," three "senior human resources technicians," six "human resource specialists," three "senior human resources specialists," and two "supervising human resource specialists." The record does not reveal what functions are performed

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<sup>1</sup> Although some of the members of the class had not been residents of the United States for five years at the time the complaint was filed, and therefore were ineligible to apply immediately for citizenship, 8 U. S. C. § 1427, there is no indication that these members, assuming that they are in the same "class" as the named appellees, would be prohibited from seeking citizenship status after they had resided in this country for the required period. In any event, this circumstance only underscores the fact that it is not unreasonable to assume that they have not learned about and adapted to our mores and institutions to the same extent as one who had lived here for five years would have through social contact.

by these civil servants, although appellee Dougall apparently was the chief administrator of a program; the remaining appellees were all employees of the New York City Human Resources Administration, the governmental body with numerous employees which administers many types of social welfare programs, spending a great deal of money and dealing constantly with the public and other arms of the federal, state, and local governments.

## I

The Court, by holding in these cases and in *Graham v. Richardson*, 403 U. S. 365 (1972), that a citizen-alien classification is "suspect" in the eyes of our Constitution, fails to mention, let alone rationalize, the fact that the Constitution itself recognizes a basic difference between citizens and aliens. That distinction is constitutionally important in no less than 11 instances in a political document noted for its brevity. Representatives, Art. I, § 2, cl. 2, and Senators, Art. I, § 2, cl. 3, must be citizens. Congress has the authority "to establish an uniform Rule of Naturalization" by which aliens can become citizen members of our society, Art. I, § 8, cl. 4; the judicial authority of the federal courts extends to suits involving citizens of the United States "and foreign States, Citizens or Subjects," Art. III, § 2, cl. 5, because somehow the parties are "different," a distinction further made by the Eleventh Amendment; the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments are relevant only to "citizens." The President must not only be a citizen but "a natural born Citizen," Art. II, § 1, cl. 5. One might speculate what meaning Art. IV, § 2, cl. 1, has today.

Not only do the numerous classifications on the basis of citizenship that are set forth in the Constitution curb against both the analysis used and the results reached by the Court in these cases; the very Amendment

which the Court reads to prohibit classifications based on citizenship establishes the very distinction which the Court now condemns as "suspect." The first sentence of the Fourteenth Amendment provides:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

In constitutionally defining who is a citizen of the United States, Congress obviously thought it was doing something, and something important. Citizenship meant something, a status in and relationship with a society which is continuing and more basic than mere presence or residence. The language of that Amendment carefully distinguishes between "persons" who, whether by birth or naturalization, had achieved a certain status, and "persons" in general. That a "citizen" was considered by Congress to be a rationally distinct subclass of all "persons" is obvious from the language of the Amendment.

It is unnecessary to venture into a detailed discussion of what Congress intended by the Citizenship Clause of the Fourteenth Amendment. The paramount reason was to amend the Constitution so as to overrule explicitly the *Dred Scott* decision. *Scott v. Sandford*, 19 How. 393 (1857). Our decisions construing "the privileges and immunities of citizens of the United States" are not irrelevant to the question now before the Court, insofar as they recognize that there are attributes peculiar to the status of federal citizenship. See, e. g., *Slaughter House Cases*, 16 Wall. 36, 79 (1873); *United States v. Cruikshank*, 92 U. S. 542 (1876); *Ex Parte Yarbrough*, 110 U. S. 651 (1884); *Crutcher v. Kentucky*, 141 U. S. 47 (1891); *Logan v. United States*, 144 U. S. 263 (1892); *In re Quarles*, 158 U. S. 532 (1895). Cf. *Crandall v. Nevada*, 6 Wall. 35 (1868). Decisions of this Court

holding that an alien is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment are simply irrelevant to the question of whether that Amendment prohibits legislative classifications based upon this particular status. Since that Amendment by its own terms first defined those who had the status as a lesser included class of all "persons," the Court's failure to articulate why such classifications under the same Amendment are now forbidden serves only to illuminate the absence of any constitutional foundation for these instant decisions.

This Court has held time and again that legislative classifications on the basis of citizenship were subject to the rational basis test of equal protection, and that the justifications then advanced for the legislation were rational. See *Ohio ex rel. Clark v. Deckenbach*, 274 U. S. 392 (1927); *Terrace v. Thompson*, 263 U. S. 197 (1923); *Porterfield v. Webb*, 263 U. S. 225 (1923); *Webb v. O'Brien*, 263 U. S. 313 (1923); *Frick v. Webb*, 263 U. S. 326 (1923); *Pastone v. Pennsylvania*, 232 U. S. 138 (1914); *Blythe v. Hinckley*, 180 U. S. 333 (1901); *Hauenstein v. Lynham*, 100 U. S. 483 (1880).

This Court explicitly held that it was not a violation of the Equal Protection Clause for a State by statute to limit employment on public projects to citizens. *Heim v. McCall*, 239 U. S. 175 (1915); *Crane v. New York*, 239 U. S. 195 (1915). Even if the Court now considers that the justifications for those enactments are "not controlling," those decisions clearly hold that the rational basis test applies.

To reject the methodological approach of these decisions, the Court now relies in part on the decisions in *Truax v. Raich*, 239 U. S. 33 (1915), and *Takahashi v. Fish & Game Comm'n*, 334 U. S. 410 (1948). In *Truax*, the Court invalidated a state statute which prohibited employers of more than five persons from employing



more than 20% noncitizens. The law was applicable to all businesses. In holding that the law was invalid under the Equal Protection Clause, the Court took pains to explain that the decision was not meant to disturb prior holdings, *id.*, at 39, and specifically noted that "it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys." *Id.*, at 40. Indeed, *Heim* and *Crane* were decided after *Truax*, as was *Clarke*, which held that a State could constitutionally prohibit aliens from engaging in certain types of businesses. If anything, *Truax* was limited by these later decisions.

*Takahashi* involved a statute which prohibited aliens "ineligible for citizenship" under federal law from receiving commercial fishing licenses. A State whose classification on the basis of race would have been legitimately "suspect" under the Fourteenth Amendment was in effect using Congress' power to classify in granting or withholding citizenship. The Court did not countenance this attempt at discrimination on the basis of race "by incorporation." Two features of that law should be noted. First, the statutory classification was not one involving citizens and aliens; it classified citizens and those resident aliens eligible for citizenship into one group, and resident aliens ineligible for citizenship into another. No reason for discriminating among resident aliens is apparent. Second, and most important, is the fact that, although the Court properly refused to inquire into the legislative motive, the overwhelming effect of the law was to bar resident aliens of Japanese ancestry from procuring fishing licenses. The Court was not blind to this fact, or to history. See *id.*, at 412, n. 1, 413. The state statute that classifies aliens on the basis of country of origin is much more likely to classify on the basis of race, and thus



conflict with the core purpose of the Equal Protection Clause, than a statute that, as here, merely distinguishes between alienage as such and citizenship as such. *Takahashi* did not, however, overrule previous decisions, and certainly announced no "suspect classification" rule with regard to citizen-alien classifications. To say that it did evades rather than confronts precedent.

The third, and apparently paramount, "decision" upon which the Court relied in *Graham*, and which is merely quoted in the instant decisions, is a footnote from *United States v. Carolene Products Co.*, 304 U. S. 144, 152-153 n. 4 (1938), a case involving a federal statute prohibiting the interstate shipment of filled milk. That footnote discussed the presumption of constitutionality of statutes and stated:

"Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters*, 268 U. S. 510, or national, *Meyer v. Nebraska*, 262 U. S. 390; *Bartels v. Iowa*, 262 U. S. 404; *Farrington v. Tokushige*, 273 U. S. 484 [sic], or racial minorities, *Nixon v. Herndon*, *supra*; *Nixon v. Condon*, *supra*: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

On the "authority" of this footnote, which only four Members of the Court in *Carolene Products* joined, the Court in *Graham* merely stated that "classifications based on alienage . . . are inherently suspect" because "[a]liens as a class are a prime example of a 'discrete and insular' minority for whom such heightened judicial solicitude is appropriate."

As Mr. Justice Frankfurter so aptly observed:

"A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the *Carolene* footnote did not purport to announce any new doctrine . . . ." *Kovacs v. Cooper*, 336 U. S. 53, 90-91 (1949) (concurring).

Even if that judicial approach were accepted, however, the Court is conspicuously silent as to why that "doctrine" should apply to this case.

The footnote itself did not refer to "searching judicial inquiry" when a classification is based on alienage, perhaps because there was a long line of authority holding such classifications entirely consonant with the Fourteenth Amendment. The "national" category mentioned involved legislative attempts to prohibit education in languages other than English, which attempts were held unconstitutional as a deprivation of "liberty" within the meaning of the Fourteenth and Fifth Amendments. These cases do not mention a "citizen-alien" distinction, nor do they support a reasoning that "nationality" is the same as "alienage."

The mere recitation of the words "insular and discrete minority" is hardly a constitutional reason for prohibiting state legislative classifications such as are involved here, and is not necessarily consistent with the theory propounded in that footnote. The approach taken in *Graham* and these cases appears to be that whenever the Court feels that a societal group is "discrete and insular," it has the constitutional mandate to prohibit legislation that somehow treats the group differently from some other group.

Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly

take extraordinary ingenuity for a lawyer to find "insular and discrete" minorities at every turn in the road. Yet unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can chose a "minority" it "feels" deserves "solicitude" and thereafter prohibit the States from classifying that "minority" differently from the "majority." I cannot find, and the Court does not cite, any constitutional authority for such a "ward of the Court" approach to equal protection.

The only other apparent rationale for the invocation of the "suspect classification" approach in these cases is that alienage is a "status," and the Court does not feel it "appropriate" to classify on that basis. This rationale would appear to be similar to that utilized in *Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), in which the Court cited, without discussion, *Graham*, 406 U. S., at 176 n. 14. But there is a marked difference between a status or condition such as illegitimacy, national origin, or race, which cannot be altered by an individual and the "status" of the appellant in 71-1336 or of the appellees in 71-1222. There is nothing in the record indicating that their status as aliens cannot be changed by their affirmative acts.

## II

In my view, the proper judicial inquiry is whether any rational justification exists for prohibiting aliens from employment in the competitive civil service and from admission to a state bar.

"State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if

any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U. S. 425-426 (1961).

Before discussing this question, a preliminary reflection on the Court's opinions is warranted. Perhaps the portions of the opinions that would most disturb both native born citizens but especially naturalized citizens, who have worked diligently to learn about our history, mores, and political institutions and who have successfully completed the rigorous process of naturalization, is the intimation, if not statement, that they are really not any different from aliens. The Court concludes that, because aliens residing in our country must pay taxes and some of them (but not appellant in 71-1336) might at one time have been subject to service in the armed forces, the two "groups" are indistinguishable for purposes of equal protection analysis. Compulsive military service has been ended by Congress.<sup>2</sup> Given the ubiquity of taxes in our present society, it is, in my opinion, totally unconvincing to attribute to their payment the leveling significance indicated by the Court. Is an alien who, after arriving from abroad in New York City, immediately purchases a pack of cigarettes, thereby paying federal, state, and city taxes, really no different from a citizen?

The opinion of the Court in 71-1222 would appear to

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<sup>2</sup> Although stated in *Graham* and the instant cases that aliens are "like" citizens because they were subject to service in the armed services, none of the opinions considered in fact that Congress provided that aliens who in fact served honorably could expeditiously become citizens. 8 U. S. C. § 1440. The Court's reliance on the fact that some male aliens had to register for the draft and serve if called to suggest that aliens and citizens are "the same" neglects to consider this statute: aliens who served honorably were "like" citizens in that they demonstrated, like citizens, a commitment to our society that Congress believed warranted, other considerations aside, their immediate, formal acceptance into our society.

answer this question in the negative, but it then proceeds to state that there is a difference between aliens and citizens for purposes of participation and service in the political arenas. Unless the Court means that citizenship only has meaning in a political context, the analytical approach of the Court is less than clear, hardly convincing, and curiously conflicts with the high non-political value that the Court has heretofore ascribed to citizenship. If citizenship is not "special," the Court has wasted a great deal of effort in the past. Cf. *Afroyim v. Rusk*, 387 U. S. 257 (1967); *Trop v. Dulles*, 356 U. S. 86 (1958).

These statutes do not classify on the basis of country of origin; the distinctions are not between native Americans and "foreigners," but between citizens and aliens. The process of naturalization was specifically designed by Congress to require a foreign national to demonstrate that he or she is familiar with the history, traditions, and institutions of our society in a way that a native born citizen would learn from formal education and basic social contact. Congress specifically provided that an alien seeking citizenship status must demonstrate "an understanding of the English language" and "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States." 8 U. S. C. § 1423. The purpose was to make the alien establish that he or she understood, and could be integrated into, our social system.

"Through the system of citizenship classes sponsored by the Immigration and Naturalization Service and the local school system, the alien is aided in preparing himself for citizenship, and every effort is made to give him fundamental and uniform knowledge of our political and social structure. In order that he may intelligently use this fundamental and

*uniform knowledge and so that he may become a complete and thoroughly integrated member of our American society*, the committee [House Judiciary Committee] feels that he should have a basic knowledge of the common language of the country and be able to read, write, and speak it with reasonable facility." 1952 U. S. C. Cong. & Admin. N. 1736 (emphasis added).

See also 8 U. S. C. § 1424, which precludes aliens who manifest certain opposition to our society or form of government from being naturalized. An alien must demonstrate "good moral character," 8 U. S. C. § 1427 (a)(3), which was intended by Congress to mean a broad "attach[ment] to the principles of the Constitution of the United States and [disposition] to the good order and happiness of the United States." 1952 U. S. C. Cong. & Admin. N. 1739. See also 8 CFR § 332b (1973), detailing the cooperation between the I. N. S. and local schools conducting citizenship education for applicants for naturalization. The above is sufficient to demonstrate, I believe, that Congress provided that aliens seeking citizenship status prove what citizens by birth are, as a class, presumed to understand: a basic familiarity with our social and political mores and institutions. The naturalized citizen has demonstrated both the willingness and ability to integrate into our social system as a whole, not just into our "political community," as the Court apparently uses the term. He proved that he has become "like" a native-born citizen in ways that aliens, as a class, could be presumed not to be. The Court simply ignores the purpose of the process of assimilation into and dedication to our society that Congress prescribed to make aliens "like" citizens.

In 71-1222, I do not believe that it is irrational for New York to require this class of civil servants to be



citizens, either natural born or naturalized. The proliferation of public administration that our society has witnessed in recent years, as a result of the regulation of conduct and the dispensation of services and funds, has vested a great deal of *de facto* decision- or policy-making authority in the hands of employees who would not be considered the textbook equivalent of policymakers of the legislative or "top" administrative variety. Nevertheless, as far as the private individual who must seek approval or services is concerned, many of these "low level" civil servants are in fact policy-makers. *Goldberg v. Kelly*, 397 U. S. 254 (1970), implicitly recognized that those who apply facts to individual cases are as much "governors" as those who write the laws or regulations the "low-level" administrator must "apply." Since policy-making for a political community is not necessarily the exclusive preserve of the legislators, judges, and "top" administrators, it is not irrational for the City of New York to provide that only citizens should be admitted to the competitive civil service.

But the justification of efficient government is an even more convincing rationale. Native-born citizens can be expected to be familiar with the social and political institutions of our society; with the society and political mores that affect how we react and interact with other citizens. Naturalized citizens have also demonstrated their willingness to adjust to our patterns of living and attitudes, and have demonstrated a basic understanding of our institutions, system of government, history, and traditions. It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect "government" to treat us. An alien who grew up in a country in which political mores do not reject bribery or self-dealing to the same extent that our culture does; in which an imperious



bureaucracy historically adopted a complacent or contemptuous attitude toward those it was supposed to serve; in which fewer if any checks existed on administrative abuses; in which "low-level" civil servants serve at the will of their superiors—could rationally be thought not to be able to deal with the public and with citizen civil servants with the same rapport that one familiar with our political and social mores would, or to approach his duties with the attitude that such positions exist for service, not personal sinecures of either the civil servant or his or her superior. These considerations could rationally be expected to influence how an administrator in charge of a program, such as appellee Dougall, made decisions in allocating funds, hiring or dealing with personnel, or decision-making, or how a lower-level civil servant, such as appellee Jorge, was able to perform with and for fellow workers and superiors, even if she had no direct contact with the public. All these factors could materially affect the efficient functioning of the city government, and possibly as well the very integrity of that government. Such a legislative purpose is clearly not irrational.

In 71-1336 the answer is not as clearcut. The States traditionally have had great latitude in proscribing rules and regulations concerning technical competence and character fitness, governing those who seek to be admitted to practice law. See, *e. g.*, *Konigsberg v. State Bar of California*, 366 U. S. 36 (1961). The importance of lawyers and the judiciary in our system of government and justice needs no extended comment. An attorney is an "officer of the court" in Connecticut, a status this Court has also recognized. See, *e. g.*, *Powell v. Alabama*, 287 U. S. 45, 73 (1932); *Ex Parte Garland*, 4 Wall. 333, 370 (1866). He represents his client, but also, in Connecticut, may "sign writs, issue subpoenas, take recognizances, and administer oaths." Conn. Gen. Stat. § 51-85.

More important than these emoluments of their position, though, is the tremendous responsibility and trust that our society places in the hands of lawyers. The liberty and property of the client may depend upon the competence and fidelity of the representation afforded by the lawyer in any number of particular lawsuits. But by virtue of their office lawyers are also given, and have increasingly undertaken to exercise, authority to seek to alter some of the social relationships and institutions of our society by use of the judicial process. No doubt an alien even under today's decision may be required to be learned in the law and familiar with the language spoken in the course of the particular State involved. But Connecticut's requirement of citizenship reflects its judgment that something more than technical skills are needed to be a lawyer under our system. I do not believe it is irrational for a State that makes that judgment to require that lawyers have an understanding of the American political and social experience, whether gained from growing up in this country, as in the case of a native-born citizen, or from the naturalization process, as in the case of a foreign-born citizen. I suppose the Connecticut Bar Association could itself administer tests in American history, government, and sociology, but the State did not choose to go this route. Instead, it chose to operate on the assumption that citizens as a class might reasonably be thought to have a significantly greater degree of understanding of our experience than would aliens. Particularly in the case of one such as appellant, who candidly admits that she wants to live and work in the United States but does not want to sever her fundamental social and political relationship with the country of her birth, I do not believe the State's judgment is irrational.

I would therefore reverse the judgment in No. 71-1222 and affirm that in No. 71-1336.